(22,173 and 22,174.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 555.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

No. 556.

UNION PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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a In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Citation on Appeal.

THE UNITED STATES OF AMERICA,
Eighth Judicial Circuit:

The President of the United States to F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, or M. B. Koon and Frank Hagerman, their solicitors of record, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to the appeal sued out and filed in the Clerk's Office, in the United States Circuit Court for the Western Division of the Western District of Missouri, in the cause wherein the Union Pacific Railroad Company, and Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members composing the Interstate Commerce Commission, are the defendants, and the said F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, are the complainants, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission and the members
b of said Commission, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Hon. William C. Hook, U. S. Circuit Judge for the Western Division of the Western District of Missouri, this the 3rd day of March in the year of our Lord, One Thousand Nine Hundred and Ten.

WILLIAM C. HOOK,
Circuit Judge.

Service acknowledged this April 1, 1910.

FRANK HAGERMAN,
For Appellees.

c [Endorsed:] #3405. In Equity. F. H. Peavey & Co. et al., complainants, vs. Union Pac. Rd. Co. et al., Defts. Citation. Filed April 12, 1910. Adelaide Utter, Clerk.

d In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin M. Lane, James S. Harlan and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court for the Western Division of the Western District of Missouri and filed in the clerk's office of said court on the first day of April, A. D. 1910, in a cause wherein Union Pacific Railroad Company and others are appellants and you are appellees, to show cause, if any, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of April, A. D. 1910.

WILLIAM C. HOOK,
Judge of the United States Circuit Court.

e Service of a copy of within citation is hereby admitted, this first day of April, A. D. 1910.

FRANK HAGERMAN,
Attorney for Appellees.

f [Endorsed:] In Equity. No. 3405. In the Circuit Court of the United States for the Western Division of the Western District of Missouri. F. H. Peavey & Company, et al., Complainants, vs. Union Pacific Railroad Co., et al., Defendants. Citation. Filed April 12, 1910. Adelaide Utter, Clerk.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, to wit, on the 21st day of October, A. D. 1908, a Bill of Complaint was filed in the office of the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, in the case wherein F. H. Peavey & Company, et al., are complainants and the Union Pacific Railroad Company, et al., are defendants.

Said Bill of Complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405.

F. H. PEAVEY AND COMPANY, OMAHA ELEVATOR COMPANY and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Bill in Equity.

To the Honorable the Judges of the Court aforesaid:

Your orators, the above named complainants, present this, their bill of complaint against the above named defendants, and thereupon they aver:

1. Complainant, F. H. Peavey & Company, herein called "Peavey & Company," is a corporation organized and existing under the laws or West Virginia with its chief offices, therein and a citizen thereof. The Omaha Elevator Company, another of the complainants, herein called the Omaha Company, is a corporation organized and existing under the laws of Nebraska, with its chief office therein and a citizen thereof. The Midland Elevator Company, another of the complainants, herein called the Midland Company, is a corporation organized and existing under the laws of West Virginia, with its chief office therein and a citizen thereof. The defendant, Union Pacific Railroad Company, herein called the Union Pacific, is a corporation organized and existing under the laws of Utah and a citizen thereof, having a principal operating office at Kansas City, Missouri. The Inter-State Commerce Commission, herein called the Commission, is and has, since prior to January 1, 1908, been composed of the following defendants, each of whom is a
2 citizen of the state mentioned immediately following his name: Martin A. Knapp, of New York; Judson C. Clements, of Georgia; Charles A. Prouty, of Vermont; Francis M. Cockrell, of Johnson County, Missouri; Franklin K. Lane, of California; James S. Harlan, of Illinois, and Edgar E. Clark, of Iowa. This

is a suit arising under the laws of the United States, and also wherein there is involved a controversy between citizens of different states, the matter and amount in dispute exceeding, exclusive of interest and costs, the sum or value of two thousand dollars.

2. Frank H. Peavey was in 1899, and for years prior thereto, a large dealer in grain operating in the territory traversed by the Union Pacific, buying the grain at the points of production and forwarding it to the eastern and foreign markets. He was the senior member of the firm of F. H. Peavey & Company, but, dying in 1901, his estate and legal representatives continued the business under the same name, organizing the Omaha and Midland companies, and at all times owning a majority of the stock of each. Each of these companies is a large and extensive buyer of grain along the line of the Union Pacific, owning a large number of elevators in the country, having upon the faith of the contracts in the next paragraph mentioned, and for the purpose of carrying the same out, invested several hundred thousand dollars. In dealing with the matters hereinafter mentioned and making the orders of which complaint is made, the Commission treated F. H. Peavey & Company as the virtual owners of the business of the Omaha and Midland companies because it owned a majority of the stock and conducted the business of those companies really in connection with and incident to its own business, and upon this theory the orders hereinafter mentioned were made.

3. The Union Pacific and its predecessors in title have for years, and during the period herein mentioned, operated and still operate an extensive system of railways in the states of Nebraska, Kansas, Colorado, Wyoming and Utah, one of the main lines extending from Council Bluffs, Iowa, to Ogden, Utah, and another one from Kansas City, Missouri, to Denver, Colorado. These lines traverse the greatest grain producing territory of the United States, and the system is operated exclusively west of Council Bluffs and Kansas City, which are known as Missouri River points, because located upon that river, the Union Pacific having no rails leading to any of the markets thereof. It is the only railway in this situation. Its competitors are composed of great railway systems whose lines extend from the same territory past the Missouri River and to the markets at and east and south of the Mississippi River and the great lakes. Other large systems of railways extend east from the Missouri River but have no tracks west thereof. The states of Nebraska and Kansas constitute the heart of the grain production of the United States, and a large portion of this production is tributary to and has always been carried by the Union Pacific on its way to eastern and foreign markets. If this grain is carried to destination in the Union Pacific cars in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific has no control. As the principal markets of consumption are in the eastern states and foreign markets, the grain must be carried long distances to reach domestic destination or the ports of trans-shipment abroad. In such cases the cars are absent from the originating road for considerable periods of time and the in-

terval before their return is a matter of uncertainty. When
3 this method of transporting the grain is employed the Union Pacific must relinquish the possession of its cars at the Missouri River and can get them back again only after prolonged and indefinite absence. In the meantime the company is deprived of the use of such cars and cannot know when they will again be available for its own shippers. For the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight. The movement is not constant and regular throughout the year, but is largely confined to comparatively short seasons, depending more or less on the size of the crop and the range of obtainable prices. During the grain shipping season there is a pressing demand for cars, particularly when market conditions tend to stimulate sales. It is a matter of common knowledge that the last few years have been exceptionally prosperous in all branches of business. Not only has the grain production of the states named been greatly increased, but traffic of all kinds has been offered for carriage in unprecedented volume. Although the Union Pacific, in common with other roads, made large additions to its car and locomotive equipment, it has frequently been unable to meet the requirements of the shipper. The growth of its traffic exceeded the increase of its transportation facilities. Under these circumstances it could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods in order to carry to destination the grain originating on its lines. Moreover, the loading of cars at the country stations, either because the older cars of the Union Pacific were of low capacity, or because of conditions at the points of origin, was in most cases comparatively light. The economical movement of this grain for the long distance it is carried east of the Missouri River requires a heavier loading of cars than could ordinarily be secured at the local stations of the initial road. In actual practice the original loading of grain cars on the line of the Union Pacific generally fell below the loading needful to the cheapest hauling of grain to remote destinations. It, therefore, became essential to the Union Pacific to provide for the transfer of the grain to cars other than its own at its termini at the said Missouri River points. Such a transfer was practically necessary to secure the prompt release of its equipment to enable it to retain the control and use of its cars and thereby to better satisfy the demands of the shippers upon other lines. This requirement of the situation could be met by the Union Pacific either by arranging for the transfer by its own appliances and employees or by contract with others to perform the required services. The latter course was adopted and thereupon an agreement was entered into on February 7, 1899, at the request of the Union Pacific, by and between it and Frank H. Peavey in good faith and for a valuable consideration by the terms of which it was, among other things, provided: The railroad company agreed to convey to Peavey a certain tract of land in Council Bluffs, containing about 90,000 square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey

was to construct; to provide yard room and maintain a
4 system of side-tracks and switches in connection with such elevator according to plans shown on a map attached to and made a part of the contract; to deliver to said elevator all grain originating on its lines and transported thereover which might be consigned to or in cars of said elevator, and to pay Peavey on all such grain transferred through said elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but at no time more than the transfer charge customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by it at Omaha or Council Bluffs, and to switch free of charge all cars, loaded or empty, to and from said elevator, between points on its road within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading or transfer of grain at said elevator as cheaply as it handles cars for loading, unloading or transfer — any other elevator at Omaha or Council Bluffs, and not exceeding such aggregate sum in any one year as will equal five per cent on its investment, as described in the contract, the total cost to be apportioned between the several lines on a wheelage basis; and to permit other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, which are not claimed in this proceeding to be unfair or unreasonable. Peavey on his part agreed to erect on said premises and have ready for operation by June 1, 1899, a first-class elevator, equipped with modern appliances, of the capacity of about 1,500,000 bushels, and thereafter to maintain the same in like condition; to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator to the capacity thereof, and to transfer promptly such grain from the company's cars through said elevator, the grain tendered by the company to be first transferred and its cars promptly released; and to receive and safely store in said elevator for forty-eight hours free of charge any grain originating on the company's lines and delivered from its tracks at said elevator for storage or transfer. Pursuant to this contract, and upon the faith thereof, an elevator was built at the cost of about two hundred thousand dollars. It was completed in the summer of 1899 and has been in operation since that time. While the elevator was in the course of construction at Council Bluffs, or soon thereafter, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Company, which, being organized for the purpose, acquired the elevator plant and business and has since owned and conducted the same, at all times carrying out the provisions of the contract, the stock of the company being practically all owned by F. H. Peavey & Company. The situation being similar at Kansas City, a similar arrangement was made with the Midland Company for the transfer and elevation of grain at that point. There was

erected by the Midland Company, likewise organized for the purpose, an elevator of one million bushels capacity, at very large cost. The arrangement made and carried out was substantially and practically, if not identically, the same as that with the Omaha Company. These agreements were at the time made in good faith and have ever since been in good faith carried out in conformity to their terms and to the mutual satisfaction of the parties, with the single exception of a reduction in the rate as hereinafter mentioned. A large portion of the grain shipped over the Union Pacific is bought by and shipped to said companies at their respective elevators, where it is transferred and reshipped to eastern and foreign markets, the amount going through the elevator at Omaha averaging annually over six million bushels, while that annually going through the elevator of the Midland Company averages in excess of 2,500,000 bushels. Although the Omaha and Midland companies have on the tracks of the Union Pacific 46.6 per cent of the facilities for handling all of the grain business thereof, they in fact have not been able to secure more than 38.5 per cent thereof. The elevation and transfer of this grain at the said termini was and is absolutely essential, and one and one-quarter cents per hundred pounds was and is reasonable and just charge therefor, and less than the actual cost of the service. That sum was paid by the Union Pacific up to the time of the taking effect of the order of the Commission of date April 9, 1907, hereinafter mentioned, and thereafter three-quarters of a cent per hundred pounds was paid until the taking effect of the order of the Commission of date June 29, 1908, also hereinafter more particularly mentioned.

4. Although the said contracts with the Union Pacific had been long generally and publicly known, in July, 1902, the Commission, of its own motion, made written inquiry of the company in reference thereto and then had frankly disclosed to it in the minutest detail every fact relative thereto. It took no action in reference to the same. Afterwards, upon May 7, 1903, the Commission, at the instigation and request of a rival carrier, made an order of inquiry, recorded as upon its own motion, into the validity of and practice under said contracts. The Union Pacific, Omaha and Midland Companies each appeared and each, among other things, contended that the Commission should not make any order or enter into any inquiry because the fact was (as it is) that the elevation and transfer services were but an incident to as distinguished from inter-state commerce itself. The case was vigorously prosecuted by counsel of rival carriers, and after full investigation, the taking of much proof and the submission of extended oral and printed arguments, the Commission upon June 25, 1904, rendered an opinion, made a finding and entered an order, copies of which are hereto attached, marked "Exhibit 1" and made a part hereof, finding and declaring to be true the facts set forth in paragraph three hereof, and also in addition thereto the following, which were and are facts:

6 *a.* Said contracts are entered into and carried out in absolute good faith, and large sums expended in reliance thereon.

b. The transfer and elevation services were only made at the termini of the railroad and were absolutely essential and indispensably necessary for the economic, expeditious, practicable and profitable handling of the grain business for the Union Pacific.

c. Payment to the shipper for the services so rendered in nowise affected the rate, deprived competitors of the Union Pacific of no business, and was not reflected in the prices paid at the grain producing points of the interior.

d. One and one-quarter cents per hundred pounds for the services was a reasonable, just and fair price, and the Union Pacific being entitled to do the work itself or hire it done by others, had the right to make the payment therefor to the Omaha and Midland companies respectively, upon the rendition of the services by them.

5. Having been by the argument impressed that the elevation and transfer services aforesaid was but an incident to interstate commerce, and, therefore, not within the provisions of the inter-state commerce act, the Commission in their report to Congress for 1905 made an appeal for relief in these words:

"Terminal roads, elevator charges, and private cars. There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway, and without injury to the public, if provided by the shipper himself. We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

It caused its members to appear before the Congressional committee to urge an amendment to the law so that in this respect it would be changed. Congress responded to the request thus made by passing the amendment of June 29, 1906, 34 Statutes at Large, 584, attempting to make inter-state "transportation" include "elevation and transfer in transit." The amendments were:

a. A provision reciting:

"And the term 'transportation' shall include cars * * * and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported, and it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor * * *."

b. One requiring the carrier in its published schedule of charges to separately state "all terminal * * * storage * * * and all other charges * * * all privileges and facilities granted * * *"

c. Another giving the shipper the right to furnish the facility by providing:

"If the owner of property, transported under this Act, directly or indirectly, renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect, and be enforced in like manner as the orders above provided for in this section."

In the light of the previous history of the litigation it was the intention of Congress to make such provisions applicable to the contracts hereinbefore set forth, and to permit complainants to furnish the services aforesaid and to be paid the reasonable value thereof. This was all the Commission had asked, and the provisions came solely in response to the request. This legislation was violative of the constitution, in that Section 8, Article I, only permits Congress to regulate commerce and does not permit it to deal with mere incidents thereto such as elevation and transfer charges, and as applied to complaints, impairs the obligation of contracts, depriving the complainants of their property without process of law, and taking their property for public use without compensation contrary to the Fifth Amendment to the Constitution of the United States. The Union Pacific did, however, at all times properly publish, as provided by statute, its schedule of rates and charges, therein separately stating the said elevation and transfer charges being paid as aforesaid.

6. After the passage of the amendatory law aforesaid, and in July, 1906, upon the petition of still another rival railroad, the Commission, without a hearing or notice of any kind, summarily ordered the case re-opened for further evidence and argument. A second hearing was then had, further proofs adduced and additional oral and printed arguments submitted. The Commission, on April 9, 1907, made a

finding and entered an order against the three complainants, copies of which are hereto attached marked "Exhibit 2" and made part hereof, that under the law as amended it was the duty of the carrier to furnish such transfer and elevation services, which duty could be performed by paying the shipper for the performance thereof, but that the allowance of one and one-quarter cents per hundred pounds was in excess of the actual cost and to the extent of the excess should be treated as unlawful, wherefore the same was
8 reduced to three-quarters of a cent per hundred pounds. There was no finding or order that the one and one-quarter cents charge was unreasonable, but the finding was that under the Act as amended no charge could be made in excess of the actual cost. As a matter of fact the one and one-quarter cents charge was not unreasonable, and was not in excess of the actual cost, but was much less than it would have cost the Union Pacific to render the service. Such finding and order were based upon the statute, which was unconstitutional for the reasons aforesaid, but if held to be constitutional was an improper application thereof, because under the statute one performing such services was not limited in the compensation therefor to the actual cost of doing the work. The determination of the Union Pacific to abide this decision, its refusal to longer publish the one and one-quarter cents rate in its schedule, the great difficulty in re-adjusting and rearranging its business and difficulty in finding a remedy, required complainants, though protesting, to receive thereafter payment at the rate of three-quarters of a cent per hundred pounds.

7. Thereafter, upon April 14, 1908, the Commission, without notice to or knowledge of the Union Pacific or these complainants, entered an order, a copy of which is hereto attached as "Exhibit 3" and made part hereof, re-opening the case and setting it down for further argument upon May 8, 1908, at which time, without any additional testimony being offered or permitted, it was again argued. Upon June 29, 1908, the Commission made a new finding and entered a new order, a copy of which is hereto attached marked as "Exhibit 4" and made a part hereof, requiring the Union Pacific from and after ten days to cease and desist from paying any sum for such services, upon the alleged and mistaken ground that under the law the Omaha and Midland companies being shippers could not receive payment for the services. No finding was made that the sum paid was unreasonable. The Commission at all times treated the payments to complainants as made to Peavey & Company and made the last order against it only because the stock of the Omaha and Midland companies was owned by it, and because these companies were found to have been formed and used for the purpose of facilitating the business of Peavey & Company, and it intends to and will enforce same against the other complainants unless restrained herein.

8. Concurrently with the order aforesaid of June 29, 1908, the Commission made a finding and entered an order in another case, copies of which are hereto attached and marked as "Exhibit 5" and made a part hereof, to which neither the complainants or the Union Pacific was a party, against rival and competing carriers of the Union

Pacific, operating in the same territory, requiring them to abstain from paying for any such service at Missouri River points after October 1, 1908, which time was thereafter extended to December 1, 1908, so that by virtue thereof, under the direction of the Commission the Union Pacific could not pay the complainants for such service after June 29, 1908, but every other rival and competing carrier could pay for such service at Missouri River points at least up to De-
9 cember 1, 1908, and at all other points in the country so pay at all times. Thereby an undue and unjust discrimination was in any event practiced, sufficient in and of itself to render null and void the order of June 29, 1908.

9. When the order of June 29, 1908, was entered, complainants demanded of the Union Pacific that it carry out and comply with its contract and bring a suit to annul and set aside the order of the Commission. This it declined to do, but finally agreed, with the consent of the Commission, to, and did, amend its published tariff and schedule so far as to provide for its continuation, but to prohibit any payment being made thereunder unless and until a court should determine there was a liability. The Commission consented to the filing of this amendment provided it could have an opportunity to be heard in any proceeding to question its orders. This end has been reached by making the members parties to this action.

10. Since the first of May, 1908, and since the promulgation and taking effect of the order aforesaid of June 29, 1908, and up to the first day of October, 1908, the Omaha and Midland companies have performed for the Union Pacific the elevation and transfer services aforesaid to the extent and in the amounts set forth in the itemized accounts hereto attached marked "Exhibit 6" and "Exhibit 7" and made a part hereof. The services will continue to be rendered and bills therefor constantly accrue. A charge of one and one-quarter cents per hundred pounds is a reasonable charge therefor, and one that complainants are entitled to make thereunder by virtue of the contracts aforesaid. Demand has been made of the Union Pacific of the sums due for such services, but it refuses to make any payment therefor," not only for the services rendered since June 29, 1908, but for those prior thereto, upon the pretended ground that the order of that date operates retrospectively. The order of the Commission of April 9, 1907, is erroneous in that it was not supported by the evidence and was contrary to the law, in that the person rendering the service was entitled to the reasonable, not the mere cost of the service, and one and one-quarter cents per hundred pounds was a reasonable charge. The order of the Commission of June 29, 1908, was contrary to the law and to the evidence, and it was a total misconception of the statute, if constitutional, to hold that the shipper could not render the service and be paid therefor.

Forasmuch as complainants are remediless at law and can only have relief in a court of equity where such matters are peculiarly cognizable, they pray a decree of this court setting aside each of the orders of the Commission aforesaid of date April 9, 1907, and June 29, 1908, and that the defendants, their agents and assistants, be enjoined, permanently and temporarily from enforcing or attempt-

ing to enforce the same, and also from complying with same; that an account be taken of the elevation and transfer services heretofore and hereafter rendered by each of the complainants prior to and since the order of June 29, 1908, and the Union Pacific be required to pay for the same; that the contracts for elevation and transfer be declared legal, valid and binding, and the Union Pacific be required to comply with the same, and the members of the Commission enjoined from interfering therewith, and that there be granted to complainants such other and further relief as is just and equitable.

And may it please Your Honors to grant unto complainants a writ of subpœna directed to each defendant named in the caption hereof, requiring an appearance at a day certain therein fixed, and make answer to this bill, but not under oath, as an answer under oath is expressly waived. And complainants will ever pray, etc.

FRANK HAGERMAN,
Solicitor for Complainants.

M. B. KOON,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

I, James E. Seaver, on oath say, I am vice-president of the Midland Elevator Company and agent of the other complainants, they having no other representative in this district. I have read the foregoing bill and the facts stated therein are to my knowledge true.

JAMES E. SEAVER.

Subscribed and sworn to before me this 21st day of October, 1908. My commission expires on the 7th day of June, 1910.

[SEAL.] E. E. BALL,
Notary Public.

11 EXHIBIT 1.

No. 687.

In the Matter of Allowances to Elevation by the Union Pacific Railroad Company.

Decided June 25, 1904.

The U. P. R. Co. entered into contracts with P. & Co. under which the latter erected grain elevators at Council Bluffs and Kansas City for the transfer of grain at those terminals of the U. P. System, and for the service of transferring grain by elevator at said points the U. P. agreed to pay P. & Co. 1¼ cents per 100 lbs. Corporations controlled by P. & Co. were formed to conduct the elevators at each point. P. & Co. are large buyers and shippers of grain in the northern and western grain producing states and control a large number

of country elevators. In making this arrangement the U. P. acted in good faith, and the facts indicate that 1¼ cents per 100 lbs. is not an excessive charge for the service as conducted by the elevator companies. The real complainants in the proceedings are carriers competing with the U. P., who claim that if this arrangement is not declared illegal they will be compelled to make similar allowances at transfer points on their lines, and no shipper nor any dealer in competition with P. & Co. has appeared to complain or protest in any manner against this arrangement. *Held:*

1. That the compensation paid for the elevator or transfer service is not unreasonable.

2. That the U. P. is entitled to perform the work itself or hire it done by others and is not legally at fault or guilty of wrong-doing because incidentally those employed by the carrier to transfer the grain are aided more or less in another line of business in which they are engaged.

3. That any injury or detriment resulting to rival carriers under the arrangement is something which the law does not seek to prevent.

J. N. Baldwin and J. C. Stubbs for Union Pacific R. R. Co.

M. B. Koon and Frank Hagerman for Omaha Elevator Company and Midland Elevator Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Ry. Co.

Report and Opinion of the Commission.

KNAPP, *Chairman:*

Acting upon information in the nature of informal complaint the Commission instituted this inquiry on its own motion to ascertain the facts respecting allowances by the defendant company to the owners of certain elevators and to determine whether, as is claimed, those allowances are in violation of law.

12 The Union Pacific Railroad Company operates an extensive system of railways in the states of Nebraska, Kansas, Colorado, Wyoming and Utah. The principal line of this system extends from Council Bluffs, Iowa, to Ogden, Utah, and there is another main line from Kansas City, Missouri, to Denver, Colorado. These two lines are connected by a line from Denver to Cheyenne, Wyoming, and from a point on the latter there is a connecting line to Julesburg on the line first described. There are also various auxiliary and branch lines in the states above mentioned, the total mileage operated being nearly three thousand miles. The eastern termini of the system are at Council Bluffs and Kansas City, both located on the Missouri River. No line leading easterly or southerly from those points is owned or controlled by the Union Pacific company.

The lines competing with the Union Pacific in Nebraska are the Burlington, the Rock Island, and the Nebraska Division of the Chicago & Northwestern, formerly the Fremont, Elkhorn & Missouri Valley. There is limited competition in that state with the Omaha road, a part of the Northwestern system, and with the St. Joseph & Grand Island. In Kansas the principal competitors of the

Union Pacific are the Atchison, the Missouri Pacific, and the Rock Island. To some extent the Burlington and the Missouri, Kansas & Texas are competitors in the last-named state.

Of the carriers above mentioned, the Burlington, the Rock Island and the Northwestern have lines extending easterly from Council Bluffs and Omaha to Chicago. The Burlington and the Northwestern also have lines connecting Nebraska points with Chicago which do not pass through Omaha and Council Bluffs. The Burlington, the Rock Island and the Atchison have lines extending easterly from Kansas City to Chicago. The Missouri Pacific has the northern terminus at Omaha, and all its lines are west of the Missouri River. The Missouri, Kansas & Texas system is mainly south and west of Kansas City and St. Louis, though it has a line to Hannibal on the Missouri River. The St. Joseph & Grand Island is wholly in Kansas and Nebraska.

There are several important roads which extend easterly from various points on the Missouri River, but have no lines west of that river. Among these are the Chicago, Milwaukee & St. Paul and the Wabash, reaching both Omaha and Kansas City; the Chicago Great Western, reaching Omaha, St. Joseph and Kansas City; the Illinois Central, reaching Omaha; the Chicago & Alton, reaching Kansas City and St. Louis; and the Toledo, St. Louis & Western, reached St. Louis. So far as concerns the questions in this case the Union Pacific is the only extensive system operating wholly in the territory west of the Missouri River.

In the states of Nebraska and Kansas there is a large production of grain, which moves over the lines of the Union Pacific to the Missouri River on its way to eastern and foreign markets. If
13 this grain is carried to destination in the Union Pacific cars in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific has no control. As the principal markets of consumption are in the eastern states and foreign countries, the grain must be carried long distances to reach domestic destinations or the ports of trans-shipment abroad. In such case the cars are absent from the originating road for considerable periods of time and the interval before their return is a matter of uncertainty. When this method of transporting the grain is employed the Union Pacific must relinquish possession of its cars at the Missouri River and can get them back again only after prolonged and indefinite absence. In the meantime the company is deprived of the use of such cars and cannot know when they will again be available for its own shippers.

For the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight. The movement is not constant and regular throughout the year, but is largely confined to comparatively short seasons, depending more or less on the size of the crop and the range of obtainable prices. During the grain shipping seasons there is a pressing demand for cars, particularly when market conditions tend to stimulate sales. It is a matter of common knowledge that the last few years have been exceptionally prosperous in all branches of business. Not only

has the grain production in the states named been greatly increased, but traffic of all kinds has been offered for carriage in unprecedented volume. Although the Union Pacific—in common with other roads—has made large additions to its car and locomotive equipment, it has frequently been unable to meet the requirements of shippers. The growth of its traffic has exceeded the increase of its transportation facilities. Under these circumstances it could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods, in order to carry to destination the grain originating on its lines.

Moreover, the loading of cars at the country stations, either because the older cars of the Union Pacific are of low capacity or because of conditions at the points of origin, is in most cases comparatively light. The economical movement of this grain for long distances it is carried east of the Missouri River requires a heavier loading of cars than can ordinarily be secured at the local stations of the initial road. It seems reasonable to believe that in actual practice the original loading of grain cars on the lines of the Union Pacific would generally fall below the loading needful to the cheapest hauling of the grain to remote destinations.

For these and perhaps other reasons it became highly important, if not absolutely essential, for the Union Pacific to provide for the transfer of this grain to other cars than its own at its termini on the Missouri River. Such a transfer was practically necessary to secure the prompt release of its equipment, to enable it to retain the control and use of its cars and thereby to better satisfy the demands of shippers upon its lines. This requirement of
14 the situation could be met by the Union Pacific either by arranging for the transfer by its own appliances and employés or by contracting with others to perform the required service. The latter course was adopted and thereupon an agreement was entered into which will now be described.

This agreement was executed under date of February 7, 1899, and the contracting parties are the Union Pacific Railroad Company and Frank H. Peavey, of Minneapolis. The provisions of the contract are somewhat elaborate, but those material to the present controversy can be briefly stated. The railroad company agreed to convey to Peavey a certain tract of land in Council Bluffs, containing about 90,000 square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey was to construct; to provide yard room and maintain a system of side-tracks and switches in connection with such elevator, according to plans shown on a map attached to and made a part of this contract; to deliver to said elevator all grain originating on its lines and transported thereover which might be consigned to or in cars of said elevator, and to pay Peavey on all such grain transferred through said elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but at no time more than the transfer charge

customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by it at Omaha or Council Bluffs, and to switch free of charge all cars, loaded or empty, to and from said elevator, between points on its road within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading or transfer of grain at said elevator as cheaply as it handles cars for loading, unloading or transfer to any other elevator at Omaha or Council Bluffs, and not exceeding such aggregate sum in any one year as will equal five per cent on its investment, as described in the contract, the total to be apportioned between the several lines on a wheelage basis; and to permit other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, which are not claimed in this proceeding to be unfair or unreasonable.

Peavey on his part agreed to erect on said premises and have ready for operation by June 1, 1899, a first-class elevator, equipped with modern appliances, of the capacity of about 1,500,000 bushels, and thereafter to maintain the same in like condition; to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from the company's cars through said elevator, the grain tendered by the company to be first transferred and its cars promptly released; and to receive and safely store
15 in said elevator for forty-eight hours free of charge any grain originating on the company's lines and delivered from its tracks at said elevator for storage or transfer.

In pursuance of this contract the elevator was built at a cost of about $200,000. It was completed in the summer of 1899 and has been in operation since that time. While the elevator was in process of construction or soon afterwards, as we infer, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Elevator Company, a corporation which appears to have been organized for the purpose of acquiring the elevator plant and business, and which has since owned and conducted the same. This involved no substantial change of proprietorship, as a controlling interest in the stock of the corporation has always been owned by members of the firm of F. H. Peavey & Co., of which Frank H. Peavey was the senior partner. He died in December, 1901, but the business has been continued by the surviving partners, and those interested in his estate, as we understand, under the same firm name. In other words, this firm is the virtual owner of the elevator in question and the beneficiary of the contract with the Union Pacific.

A similar situation exists at Kansas City and a similar arrangement was made by the Union Pacific for the transfer of grain at that point. The elevator there is located in Kansas City, Kansas, which is commercially the same as Kansas City, Missouri. This elevator, which has a capacity of about 1,000,000 bushels, is operated by the Midland Elevator Company, a corporation whose capital stock is substantially all owned by the individual members of the

firm of F. H. Peavey & Co. There appears to be no written agreement between the Union Pacific and the Midland Elevator Company, but the terms upon which grain is transferred and stored by the latter company, and the other incidents of its relation with the Union Pacific, are practically if not identically the same as those provided in the contract with the Omaha Elevator Company above described. For this reason it seems unnecessary to make more specific findings in regard to the Midland Elevator Company or to separately discuss the questions presented by the contract with that company.

These agreements appear to have been carried out in conformity with their terms and to the mutual satisfaction of the parties thereto. It is not claimed that any greater allowances are made to the elevator companies, or that any other benefits are derived by the owners thereof, than those accorded by the contracts in question; the contention is that the observance and execution of these contracts, by reason of facts about to be stated, secured to Peavey & Co. undue preference and advantage and subject other shippers to undue prejudice and disadvantage.

F. H. Peavey & Co., according to the testimony of a member of that firm, are grain merchants and owners of elevator properties. They appear to have some 450 country elevators, as they are called, in the states of North Dakota, South Dakota, Minnesota, Iowa, Nebraska and Kansas, besides larger elevators at Council Bluffs, Kansas City, Duluth, Minneapolis and Chicago, and their
16 business is extensive in the states named and elsewhere. As above found, they control and virtually own the two elevators at Council Bluffs and Kansas City. They are also large buyers of grain upon the Union Pacific system. So much of the grain thus bought as is consigned to Omaha or Council Bluffs, that is to the Omaha Elevator Company, is purchased in the name of that company; that which is consigned to Kansas City appears to be bought in the name of the Midland Elevator Company; but this does not matter in one case or the other. The practical identity of the three concerns renders the form of the transactions quite unimportant. It is sufficiently accurate, therefore, and serves the purpose of convenience, to speak of Peavey & Co. as grain buyers and shippers on the lines of the Union Pacific.

While no definite figures were given, it is fairly inferable from the testimony, and was understood to be admitted in a general way, that Peavey & Co. handle some sixty per cent, perhaps more, of the grain shipped from Union Pacific stations. Substantially all the grain so shipped by them is transferred through these Peavey elevators, and on all that grain they are paid the 1¼ cents per hundred pounds for making the transfer. At Kansas City, however, a small amount of this grain is consumed locally, and any transfer charge collected on such grain is refunded. It also appears that little or no grain is transferred through these elevators for other parties, although the Union Pacific has the right to require such transfer under the terms of its contract. The reason assigned for not exercising this right is that the Union Pacific can and does, as a prac-

tical matter, provide for the through transportation of grain shipped by other dealers without transfer at its terminals. In the interchange of carload traffic the Union Pacific takes to point- on its lines a large number of cars belonging to its connections, and many of these cars are available for return loads of grain. In some cases also, as it seems, Union Pacific cars loaded at interior stations with grain of such dealers are allowed to go to destination, or at least to points east of the Union Pacific lines. To some extent there appears to be shovel transfer for shippers other than Peavey & Co. In these ways, it is said, the grain shipments not controlled by that firm are fully accommodated without the necessity of a transfer through the elevators in question.

Some indication of the amount of grain transferred by the Peavey elevators appears from a statement produced at the hearing. This statement shows that 12,329,381 bushels were transferred at Kansas City between July, 1898, and May, 1903; and that 23,839,533 bushels were transferred at Council Bluffs between July, 1899, and May, 1903. The amount varies greatly in different years. For example, the lowest year at Council Bluffs was 2,953,776 bushels, the highest, 8,695,594; at Kansas City the lowest was 1,120,441 bushels, the highest, 4,673,850.

Now, in view of these and other related facts, it is charged that the Union Pacific arrangement with these elevator companies owned by Peavey & Co. is preferential and unlawful. This charge is based at last upon the claim that the contract price for
17 transferring grain is exorbitant and unreasonable, that it is much greater than the necessary cost of performing the service and that, therefore, it has the indirect but actual effect of a prohibited concession or rebate to Peavey & Co., because they are the shippers of the grain thus transferred at a profit through their own elevators. In the language of one of the briefs: "The contention is that the payment of a cent and a quarter per hundred pounds is excessive, and the resultant effect of operations under said contract, and upon the basis therein provided, is that the Union Pacific Railroad Company discriminates in favor of the two elevator companies as grain shippers; that the allowance of a cent and a quarter per hundred pounds, paid to the said elevator companies for transferring their own grain, amounts in its ultimate result to a rebate because it so much reduces the through published rate, in favor of said elevator companies, but not in favor of other shippers."

This is the controverted question of fact which will now be considered. To this question much of the testimony was directed and widely divergent claims are made by different parties. Among the proofs submitted is a statement from the books of Peavey & Co., produced by a member of that firm, showing the receipts and expenses of the two elevators for a period of years. From this statement, the accuracy of which was not seriously questioned, it appears that the total earnings of the Council Bluffs elevator for the transfer of grain from July, 1899, to June, 1903, were $157,639.96; the expenses of operation, including taxes, insurance on building, maintenance and repairs, $110,468.30; and the aggregate profit,

$47,171.66, or an average annual profit of $11,792.91. At Kansas City the earnings for transferring grain from July, 1898, to May, 1903, were $92,069.63, the operating expenses, including the same items, $77,500.00, the aggregate profit, $14,569.63, the average annual profit, $2,913.92. This allows nothing in either case for interest on investment, depreciation of plant, insurance on grain in storage or expenses of general management. The elevator at Council Bluffs cost $200,000, the one at Kansas City, $150,000. If these figures are substantially correct, as we assume they are, it is evident that the transfer business, considered by itself, was unprofitable and that Peavey & Co. could not afford to construct and operate these elevators for the sole purpose of transferring grain at 1¼ cents per hundred pounds.

The chief traffic officer of the Chicago Great Western testified that elevators were operated by that road at Kansas City and St. Joseph, through which a large amount of grain is transferred at a cost, not including taxes or expenses of general management, of 1 1-6 cents per hundred pounds, and that he would be very willing, for reasons stated by him, to pay an independent company 1¼ cents for performing the service. It also appears that another carrier pays 1 cent per hundred pounds for transferring grain at Burlington, Iowa, and has done so for a number of years. This payment is made to a firm which buys extensively on the lines of that carrier and whose business is similar to that conducted by Peavey & Co. It should be stated, however, that the allowance to this concern is claimed to be made, partly at least, because of the transfer charges paid to their competitors, Peavey & Co., at Council Bluffs and Kansas City.

18 Other facts disclosed tend more or less to show that the allowance to Peavey & Co. is not unreasonable. For instance, at Council Bluffs there is another elevator, with a capacity of 750,000 bushels, belonging to the Union Elevator Company. The stockholders of that company are six railroads, viz.: the Union Pacific, the Northwestern, the Burlington, the Rock Island, the Milwaukee and the Wabash, each owning a one-sixth interest. This elevator is leased to and operated by the Trans-Mississippi Grain Company, and that company transfers grain through its elevator on the same terms and conditions that grain is transferred through the Peavey elevators. The Trans-Mississippi Grain Company is also, as we understand, a large buyer and shipper of grain. To the extent of its business, therefore, it seems to be in much the same situation as Peavey & Co. and in like relation to other buyers on lines where its purchases are made. The fact that a rival concern, operating over various roads in that section of country, receives the same compensation for transferring grain as Peavey & Co. is some indication that the amount paid is not excessive.

A like inference apparently follows from comparison with elevator charges fixed by state regulation or customarily paid at other points where large quantities of grain are handled. Without detailing the figures it is sufficient to say that the prices elsewhere applied, taking into account differences of conditions, do not establish the claim that Peavey & Co. are unduly remunerated.

Moreover, it was not seriously contended that Peavey & Co. in fact pay any more for grain than other buyers. One witness, it is true, expressed a rather vague opinion to the contrary, but aside from his statement the testimony was unqualified that the arrangement in question had not affected the prices paid to the producer. In other words, using the phrase frequently heard, the transfer charge was not "reflected into the interior." This was affirmed or admitted by all the traffic officials of other roads who were called to testify, with the single exception mentioned.

In this connection we are asked to consider the apparent absence of complaint by rival dealers respecting the arrangement in question. The shippers of grain from Union Pacific stations, other than Peavey & Co., are quite numerous, and the business of some of them must be of considerable extent. In the aggregate they handle nearly forty per cent of the grain originating on that system. Of the 202 country elevators on the Union Pacific in Nebraska, only 71 appear to be operated by Peavey & Co.; and of the 182 in Kansas, only 40 are owned by that concern. This shows a competitive interest of substantial proportions. The failure of competing shippers to make known their grievances, if they have any, or to so much as send a letter of remonstrance to the Commission, is some indication that they have not regarded the payment of these transfer charges as an undue preference to Peavey & Co. The Freight Traffic Manager of the Union Pacific positively asserts that no shipper has complained to his company, and nothing has occurred in the course of the
19 inquiry to suggest that he is misinformed or mistaken in that regard. But this elevator arrangement must have been known for a considerable time to other grain buyers upon the Union Pacific system and elsewhere. It was publicly disclosed before the Commission at Kansas City in 1902 and appears then to have been generally understood. The first hearing in this case, at Chicago, in June, 1903, when the written contract was produced, was the subject of newspaper report which gave extended publicity to these transfer charges and to the fact that they were under investigation. There is little doubt that the main features of these contracts, or at least the amounts paid thereunder for the transfer of grain, were long ago brought to the knowledge of competing shippers on the lines of the Union Pacific and to other buyers of grain in that part of the country. Yet no shipper has volunteered to come forward or been produced as a witness to sustain the accusation of unlawful conduct. The Commission is aware that wrong doing has often been suspected in connection with elevator allowances at various points, and is likewise aware that those who obtain such allowances appear to control the greater part of the grain business. For this reason it is somewhat surprising that the competitors of Peavey & Co. have failed in this proceeding to offer any objection to the transfer charges received by that firm, if those charges are believed by them to operate to their disadvantage. So far as their silence has any significance it would seem to discredit the claim that Peavey & Co. are excessively paid.

Against evidence of this character is proof of the amounts said

to be paid for transfer at various points and under conditions of alleged similarity. There is more or less shovel transfer at one place and another at a cost stated to range from $1.25 to $1.75 per car. The Rock Island pays at Kansas City $2.00 per car for cars under 50,000 pounds, $2.25 for cars over 50,000 pounds and under 60,000, and $2.50 for cars over 60,000 pounds. The Atchison pays $2.00 per car to a small elevator at Argentine, near Kansas City. The Burlington produced a contract for the construction of a large elevator at Harlem, across the river from Kansas City, and the transfer of grain by the parties agreeing to erect the same for $1.75 per car, but it appears that nothing has been done to carry out this contract. Moreover, it contains a provision, as we understand it, that if transfer charges at Kansas City are made greater "by custom or otherwise" the owners of the elevator "shall have the right to withdraw from this arrangement for transfer." The Vice-President of the Burlington also stated that his company owned an elevator at East St. Louis, where grain was transferred at a profit for one-quarter of a cent per bushel. There is no question that in so testifying he expressed his honest belief at the time, but it is fairly certain that he was mistaken. A statement subsequently filed by him, purporting to show the actual performance of that elevator for the year ending June 30, 1903, shows a total of 4,057,224 bushels of grain transferred during that period. At ¼ cent per bushel this would give gross receipts for transferring of only $10,143.06. As the elevator is stated to represent an investment of over $250,000, it is evident that it did not and could not make money in transferring grain at ¼ cent per bushel, however profitable its entire business may have been during that year.

20 Taking into account the whole evidence bearing upon the question and giving due consideration to all the facts disclosed, we are unable to find that the amount paid Peavey & Co. for transferring grain is unreasonable under the circumstances surrounding the Union Pacific. No reason is suggested why the arrangement should not be presumed to be just and fair, and nothing has been shown, in our judgment, to overcome that presumption. It may be that the needs of the Union Pacific do not require such large and expensive elevators, and that the necessary transfer could be effected by other means and with a smaller expenditure. Even if that be so, and, at most, it is quite uncertain, we would not be warranted in finding the carrier guilty of wrong-doing unless something substantial appeared, which we do not perceive, to impeach the honesty of the transaction. So far as we can see, these transfer contracts were made in good faith, for the legitimate protection of the Union Pacific, and there is failure of proof of any unlawful purpose connected with the arrangement. True, the Burlington says it would be willing to make the transfer without charge, but that of course would be upon condition that it secured the carriage of the transferred grain. To obtain the traffic and consequent earnings it might very likely afford to stand by its offer, but that is far from proving that the price paid to Peavey & Co. exceeds the actual or reasonable cost of performing the service.

Some testimony was given as to the feasibility and expense of what is called shovel transfer. This method may be cheaper under favorable conditions and for a limited volume of business, but for the extensive grain traffic of the Union Pacific it is of doubtful economy and otherwise unsatisfactory. The only efficient and adequate mode of transfer is through elevators of large capacity, located at the terminals where the transfer is to be made. This being so, it was proper and legitimate for the Union Pacific to enter into the arrangement in question; and that arrangement, from the standpoint of the carrier's interest, was expedient and desirable.

Undoubtedly the general business of Peavey & Co. is greatly benefited by the ownership of these elevators, and this they freely admitted. As a practical matter they need at some point a large amount of storage room, where grain can be graded and blended," or held to await favorable market conditions at points of destination. These and other like advantages are secured to them by operating the two elevators at Council Bluffs and Kansas City, and for this reason they can well afford to transfer grain for the Union Pacific at a price which otherwise they would not be willing to accept. As a transfer proposition pure and simple, taking into account the cost of these elevators and the expense of their operation, it would not seem to be attractive; by reason of its incidental aid to the extensive business of these grain merchants it is undoubtedly a very profitable arrangement.

It should perhaps be added that no allowance is made by
21 the Union Pacific to any country elevator whether owned by Peavey & Co. or by other parties. As we understand the matter, the only elevators to which allowances are made are the terminal elevators described in this report. It is also the fact that no charge is made by Peavey & Co. in any case to roads taking the transferred grain from these elevators for carriage to destination.

This brings us to the statement that the real complainants in this case are carriers directly competing with the Union Pacific or operating in the same general territory. These carriers allege, as above stated, that the transfer charges paid to Peavey & Co. are excessive and unreasonable, and that they have the effect of an illegal discrimination in favor of that firm and against other shippers of grain. They also say, and this is perhaps the main ground of their objection, that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowances for a like service at points where the transfer of grain may by them be deemed necessary. We quote again from the brief already referred to as follows: "If the allowance be permitted to stand the other railroads in the competitive territory must necessarily meet it in dealing with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in that territory a grain buying monopoly in favor of the Peavey elevators and a grain haul monopoly in favor of the Union Pacific Railroad Company."

With reference to this aspect of the matter it may be mentioned that in one important respect the conditions at Kansas City are unlike those at Council Bluffs. Kansas City is a grain market. A large portion of the grain carried to that point is sold there, actually changes ownership there, after the manner of a grain market, although most of it is then taken on to other destinations. For this reason, grain at Kansas City becomes subject to competition between all the lines leading easterly and southerly therefrom, some of which do not extend west of the Missouri River. On this account, it is said, the roads bringing grain to Kansas City lose control of it, so to speak, at that point and the transportation is continued by connecting lines. In other words, the originating roads which extend through to Chicago, for example, like the Atchison and the Burlington, have no advantage in this respect over originating roads which terminate at Kansas City, because of the general buying and selling which there takes place, and because through rates to the east are the same as the combined rates in and out of Kansas City. It was testified by officials of the Atchison, the Burlington and the Missouri Pacific that the amount of grain taken out of Kansas City by their respective lines is small in comparison with the amount which they severally carry to Kansas City in the first instance. Consequently, they say that they are under as much compulsion to transfer grain at Kansas City, for the release of their equipment and other purposes, as is the Union Pacific at either of its eastern terminals. Therefore, they must provide the same facilities or make the same allowances for grain transfer at Kansas City, and perhaps other places, as may escape disapproval in this proceeding in the
22 case of the Union Pacific. Whether this be true to the extent claimed is not altogether certain, but it may be assumed to be so without affecting the legal question involved because, in our view of the law, the materiality of the fact is not apparent.

Conclusions.

However objectionable the arrangement in question may appear from any point of view we are convinced, rather against our original impressions, that it cannot be adjudged unlawful. This conclusion follows from our determination of the controlling facts and there is no occasion for extended comment. We have found that these contracts for transferring grain were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service performed. The parties were competent to contract, the thing done is proper and necessary to protect the interests of the carrier, the consideration is not excessive and the honesty of the transaction is unimpeached.

Assuming the correctness of these findings, which seem to us to be required by the evidence, we are constrained to hold that no violation of law has been established. It may be that Peavy & Co. as grain shippers secure important advantages over their competitors by reason of these elevator allowances, and this we think is at least the

probable effect of the arrangement, but it does not follow that the Union Pacific is chargeable with disregard of its legal obligations. If this carrier had the right to contract for the transfer of grain at its eastern terminals, which appears to be undisputed, and if the contracts were made in good faith and the amount paid fair and reasonable, all things considered, so that the required service is obtained at no greater cost than would otherwise have been incurred, as we have substantially found, how is the transaction rendered unlawful by the circumstance that the parties contracted with are grain shippers who as such may be greatly benefited by the arrangement? The Union Pacific was not debarred from dealing with Peavey & Co. because they happen to be grain merchants as well as elevator proprietors. It was open to the carrier to do this work itself, by its own agencies and employees, or to hire it done by others if deemed more expedient; and there was nothing to prevent an honest bargain with whomsoever would undertake to furnish the desired facilities, not excluding those who were also important shippers. This being so, the Union Pacific is not legally at fault or guilty of wrongdoing because it turns out, as an incidental result, that the persons employed to transfer grain are thereby aided more or less in another line of business in which they are engaged. This in effect, as we think, decides the question presented.

It is urged, however, by other carriers, claiming to be in the same situation as the Union Pacific, that refusal to condemn the
23 transfer charges paid by that company will oblige them to make similar allowances for like service at Kansas City and elsewhere. This apprehension on their part may be well founded, but how does that alter or affect the legal rights of the respondent? The law imposes no duty upon the Union Pacific to safeguard the business of its competitors or the shippers they serve. Granted that the allowance to Peavey & Co. places these other carriers, and grain dealers on their lines, at some commercial disadvantage, that it introduces an element of competition which they will be forced to equalize—and that would seem to be its character so far as rival roads are concerned,—on what theory can the Commission interfere so long as the obligations of the Union Pacific to its own shippers are not disregarded? Plainly, as it seems to us, the indirect effect of the arrangement upon other lines or those who patronize them, whatever that effect may be, is no more a violation of the Act than would be a reduction of the rate by the Union Pacific which a competing road, in justice to its shippers or in its own interest, might feel compelled to meet. Any resulting injury or detriment to rival carriers is something which the law does not and perhaps should not seek to prevent.

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting

discrimination may not be undue, but the situation created cannot be wholly satisfactory. Under existing conditions the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

24 EXHIBIT 2.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Decided April 9, 1907.

Rehearing on the Petition of the Chicago Great Western Railway Company; the Chicago, Burlington & Quincy Railway Company, and the Atchison, Topeka & Santa Fe Railway Company.

1. Elevation is defined as unloading grain from cars or grain-carrying vessels into a grain elevator and loading it out again after a period of not to exceed ten days; it does not include "treatment" or grading, cleaning, and clipping of grain; and retention in an elevator beyond ten days becomes storage and is not a part of the service of elevation as that word is used in the statute.

2. The law clearly recognizes elevation as a facility which the carrier may provide, and this authorizes the carrier to grant grain elevation at destination or while the traffic is in transit, subject only to the restriction imposed by the act that elevation, like any other service offered by the carrier to shippers, must be open to all on equal and reasonable terms.

3. Since a carrier subject to the act to regulate commerce is entitled to provide elevation for grain shipments, such carrier may either construct and operate the elevator itself or furnish elevation by arrangement with the owner of an elevator; and the amount of compensation paid by the carrier to the owner of an elevator rendering the service is of no concern to shippers or to other carriers, unless it operates to affect the rates charged by the carrier upon the grain traffic or by some device a portion of the allowance is returned to shippers and thus becomes a rebate.

4. An allowance made to a shipper of grain, who furnishes elevation service under an arrangement with a carrier, is a rebate and an unlawful discrimination when it involves a profit over and

above the actual cost to such shipper of the service rendered. It is not a rebate when the allowance does not so exceed the actual cost. The arrangement between the Union Pacific Railroad Company and the Peavey elevators at Council Bluffs and Kansas City is not in itself unlawful. But the allowance of 1¼ cents per 100 pounds paid by the railroad company to these elevators, controlled by the Peavey interests, who are large shippers of grain and own practically all the grain going into the elevators, is in excess of the actual cost of the service, and is a rebate and therefore unlawful. Ordered, That such allowance be reduced and shall not exceed three-fourths of a cent per 100 pounds.

Davis, Kellogg & Severance for Chicago Great Western Railway Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Company.

J. W. Blythe, C. J. Green, and J. E. Kelby for Chicago, Burlington & Quincy Railway Company.

J. N. Baldwin for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Co.

John H. Marble for the Commission.

Report and Order of the Commission.

HARLAN, *Commissioner:*

The allowances on grain received over its lines that have been made for some years by the Union Pacific Railway Company to the Omaha Elevator Company and the Midland Elevator Company, proprietors of certain elevators at Council Bluffs and Kansas City, commonly known as the Peavey Elevators, were the subject of an investigation undertaken by the Commission on its own motion prior to June 25, 1904, on which date the report and opinion of the Commission was announced. Subsequently, in July, 1906, the proceeding was reopened upon the petition of certain railroad companies interested in the grain traffic of the territory tributary to those points, and much additional testimony was taken, upon which, as well as upon the original record, the whole matter has now been fully reheard, the oral arguments of counsel having been supplemented by printed briefs.

The pertinent facts developed upon the original inquiry are set forth in detail in the report and opinion then announced. (*Vide* 10 I. C. C. Rep., 309.) It will not be necessary, therefore, now to restate them. Since that time Omaha has become a grain market of sufficient importance to support fifteen grain elevators and to maintain a grain exchange whose members handle a large volume of grain shipments. The testimony adduced on the rehearing shows that the allowance of 1¼ cents per 100 pounds there-fore made to the Peavey elevators only, and more recently to the Trans-Mississippi Grain Company, has been extended to all other elevators at the cities above mentioned. Much testimony has been of-

fered tending to show that the allowance is excessive and operates as a rebate. The statute itself has also been amended so as to include "tranfer in transit," "storage," and "elevation" among the facilities of transportation which interstate carriers must or may provide for their shippers (Sec. 1). But aside from these matters the material aspects of the proceedings remain unchanged. It will suffice therefore briefly to state the conclusions reached by us upon the rehearing without further reference to the history of the matter as disclosed upon the whole record.

26 Elevation, as commonly understood among elevator men and among buyers and sellers of grain, signifies the unloading of grain from cars, or from grain-carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days. The "treatment," or grading, cleaning, and clipping of grain is not properly a part of "elevation" as the word is strictly used, and the retention of grain in an elevator beyond the period of ten days becomes storage and is not elevation. It is in this sense that the word is used in the amended statute. Without undertaking at this time definitely to decide to what extent under the amended act the furnishing of elevation as thus defined is a compulsory requirement, it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers if it finds it to its interest to do so. This being the case, we see no warrant in law for holding, as is suggested, that such elevation cannot be provided at destination and is lawful only for the transfer of grain in transit. The law seems to clothe carriers with the right to furnish elevation at any point where it may be a convenience to shippers. The only restriction imposed by the act in that connection is that the elevation offered, like any other service a carrier may hold out to shippers as an inducement to send their traffic over its line, must be open to all on equal and reasonable terms. It is true, as is said, that the usual practice is for consignees to do their own unloading at destination. But clearly there is nothing in the law or in public policy that forbids a carrier to unload for them, if it does so for all shippers alike. Generally speaking, a carrier may build up its traffic by offering its shippers any facilities of that nature. We understand it to have been so held both by the courts and by this Commission.

Having the right under the law to provide elevation for its shippers it is not to be doubted that a railroad company may either construct and operate an elevator of its own, or may furnish elevation facilities to its shippers by making some arrangement with the owner of an elevator for such a service. The amount of the compensation or allowance that may be paid to the owner for rendering such a service is not a matter of concern either to shippers or to other carriers, unless in some way it enters into the rates charged on the grain traffic and thus makes the rates excessive, or unless by some device a portion of the allowance is returned to shippers and thus becomes a rebate. And, therefore, whether the allowance now made by the Union Pacific Railroad Company to the owners of the elevators at Council Bluffs and Kansas City

be called an allowance for the prompt release of its equipment, or for the transfer of the grain in transit, or for elevation, we adhere to the view expressed in the original report and opinion of the Commissioner that such an arrangement, embracing as it now does all the available elevators at the points named and not being confined to the Peavey elevators only, is in itself not unlawful. By whatever name it may be called, the service actually rendered is in fact elevation and may be so regarded under the amended act. It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad Company for the grain of one shipper over its lines, proper arrangements must
27 be made by it for furnishing elevation to other shippers over its lines; for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers who for any reason can not use the Peavey elevators.

The vice in the situation at Council Bluffs and Kansas City arises out of the fact that the Peavey interests, besides operating the elevators in question for the railroad company, are also extensive buyers, sellers, and shippers of grain. If they were elevator men only, the amount of the allowances paid to them by the railroad company on the grain of other shippers would not have been the occasion of inquiry by the Commission, unless upon complaint by a shipper that the allowances entered into the rates and made them excessive or were being used covertly as a rebate. But being themselves dealers in grain, they perform a service for themselves and for their own grain, although operating the elevators under contract with the railroad company. It is for this reason that we still regard the arrangement as objectionable, although not necessarily and in itself unlawful. Such relations between a carrier and a shipper as the Peavey people enjoy with the Union Pacific Railroad Company, although more frank and open than the fictitious leases and contracts with elevator companies that are sometimes resorted to as a cover for rebates and other unlawful practices, nevertheless breed distrust and suspicion. Arrangements of that kind easily lead to abuses and ought not, therefore, to be encouraged. They not infrequently result in some unfair advantage to the shipper concerned. That is the case here. The record discloses that practically all the grain going into those particular elevators belongs to Peavey & Co. They therefore do the work under the contracts with the railroad company in a double capacity and with a twofold interest in the result. They are paid by the company for performing an elevation service for its shippers, and the service they render is chiefly in connection with their own grain. Besides the profit, often quite substantial, on the mixing of an inferior with a superior quality of their grain, thus raising the average grade of all and increasing its value, they receive an allowance for its elevation. The arrangement thus puts them on a special ground of advantage as buyers and sellers and shippers of grain. It ought, therefore, to be narrowly scrutinized and examined by this Commission, and so rigidly readjusted under our order as to strip it

of any possibility of working an injustice to other shippers or of resulting in a breach of the law. While we have no power under the statute to forbid a railroad company from contracting with an elevator owner for such a service, yet if the owner is also a shipper we have the authority to so regulate and control the relations between them as to protect the rights of others and to enforce the observance of the law.

Granting, then, that the allowances were not shown to be excessive upon the prior investigation, do they now appear to be unreasonable in the light of all the facts and circumstances
28 disclosed upon the rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction. It is true that under the terms of section 15 of the amended act to regulate commerce a shipper may receive, in the rates charged, a "just and reasonable" allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore, if the allowance involves a profit over and above the actual cost of the service rendered, it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection, the actual cost of the service rendered must be the limit of the allowance.

We are satisfied from all the evidence now before us that the arrangement by the Union Pacific Railroad Company with the Peavey elevators at Council Bluffs and Kansas City, under which the latter get an allowance of 1¼ cents per 100 pounds for the prompt release of the car equipment of that line, or for elevation, or whatever the service may be called, results in an appreciable profit to Peavey & Co., which can be and is used to advantage by them as buyers and shippers. The record fairly discloses this in the superior price that they seem to be able to offer to producers in the country for their grain. And therefore the proper administration of this law, as well as common fairness to competing dealers in grain, requires a substantial abatement in the amount of the allowance. The original contract between them, made for a long term of years, seems to have contemplated a reduction of the allowance to 1 cent per 100 pounds at the end of ten years, of which less than two years remain. This is a sufficient indication that the parties to the contract were themselves of the opinion that an allowance of 1 cent per 100 pounds, when it went into effect, would return a satisfactory profit over and above the actual cost of the service rendered. Moreover, our investigations have led us to the conclusion that such a service may be rendered with a reasonable and substantial profit on a charge of 1 cent. Under all these circumstances, and

having regard to the letter and spirit of the law, which forbids a shipper in any form to accept or a carrier to give a rebate, we have concluded that the allowance should now be fixed at three-quarters of 1 cent per 100 pounds as the maximum to be paid for such service. We are satisfied from the information acquired in this and other investigations as to the charges and practices at other points where large quantities of grain are handled and transferred, that an allowance of three-quarters of 1 cent will fully and amply cover the actual cost of the elevation contemplated in the law, without returning a profit and thus becoming a rebate.

An order will be entered in accordance with these views.

29 *Order.*

Upon the foregoing report—

It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required to cease and desist on or before the 1st day of June, 1907, and for a period of at least two years thereafter abstain, from giving or paying 1¼ cents per 100 pounds as and for an allowance or compensation for service rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs, in the State of Iowa, or Kansas City, in the State of Missouri, or points or places in territory adjacent thereto, to any person, firm, association, company, or corporation, directly or indirectly, engaged or interested in the buying, selling, or shipment of grain, or to any elevator company or corporation owned in whole or in part, or in anywise, directly or indirectly, controlled, by one or more such persons, firms, associations, companies, or corporations so engaged or interested, directly or indirectly, in the buying or selling of grain; and more particularly to so cease and desist from giving or paying such allowance to the Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co.; and to further cease and desist at the time and for the period aforesaid from giving or paying any allowance or compensation for such service in excess of three-fourths of a cent per 100 pounds of grain, to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co., or to any person, firm, association, company, or corporation, directly or indirectly engaged or interested in the buying, selling, or shipment of grain at the places aforesaid or adjacent thereto, or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled, by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling, or shipment of grain.

CLEMENTS, *Commissioner*, dissenting:

It is apparent that when this matter was first heard the Commission based its decision sustaining the legality of the elevator allowance to Peavey & Company largely upon the theory that the carrier had a right to unload its cars for the purpose of promptly releasing them at its terminus, and also to hire this to be done by

another, and that, inasmuch as the law did not prohibit its employment of the owner of the freight himself to do the unloading, it followed that unless the allowance was so excessive, in view of the service rendered, as to show it to be a device for a rebate, it could not be condemned under the then existing law, although it did result in advantage to Peavey & Company over their competitors in buying, shipping, and selling grain. In other words, it was held, in substance, that the contract not being expressly forbidden by law, any resulting advantage accruing to Peavey & Company, if the allowance was not so excessive as to be a rebate, was not undue, and therefore not unlawful. The Commission said in the former decision "however objectionable the arrangement in question may appear form any point of view, we are convinced, rather against our original impression, that it can not be adjudged unlawful.
30 * * * It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded." It is evident that the Commission, by its view of the law, then felt constrained to uphold the legality of the arrangement in question, although it felt that it was objectionable and of a kind not to be desired or encouraged, and the tenor of the report now made by the majority is to the same effect.

Peavey & Company are in the general grain business, buying, shipping, elevating, storing, cleaning, blending, and otherwise treating the grain in various ways and selling the same on their own account. They buy in the country and have numerous small elevators at various purchasing points into which the grain is first placed and then shipped from time to time to their larger terminal elevators, into which they load it, receiving the allowance in question. Practically all of the grain they unloaded is their own. It seems clear that the "elevation" which is defined in the act as a part of the transportation is only such elevation as is incident and necessary to the movement of the grain in transit. It must follow that Peavey & Company have an advantage to the amount of this allowance over competitors against whom they bid and buy at the grainfields, at least to the extent that such allowance exceeds the actual expense to them of the mere elevation transfer of the grain in transit. The service which they render for the carrier, and which it is bound to provide, if any, is so blended with the greater service which they render for themselves that it is impossible to tell what is the cost to them of the former, though it seems evident that the proposed allowance, as well as that in force, is large enough to cover much that the elevator company does for itself and from which it derives advantage and profit as a grain dealer. Indeed, it is difficult to see anything that the Elevator Company does in respect to shipments of grain which are not in good faith consigned through to actual destination beyond which it must not necessarily do solely for itself.

On February 19, 1906, in the cases of the New York, New Haven & Hartford Railroad Company, appellant v. The Interstate Commerce Commission, and The Interstate Commerce Commission, appellant, v. The Chesapeake & Ohio Railway Company, and the

New York, New Haven & Hartford Railroad Company, which involved the same subject-matter, the Supreme Court of the United States having heard them together, rendered one opinion, in which it is said:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

31 The prohibitions of the statute apply equally to an undue advantage or discrimination effected through the published tariff as well as to acts in disregard thereof. Applying the doctrine announced by the court in these cases to the matter before us we have now only to look to the results of the arrangement in question, irrespective of the fact that the parties are not expressly forbidden to contract between each other on the subject.

Section 1 of the act as amended August 28, 1906, defining transportation, expressly provides as follows: "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor."

The provision in section 15 for reasonable allowance to the owner of the property by the carrier for any instrumentality or service in connection with such transportation is at most permissive. Under the broad and wholesome principles announced by the court a carrier should neither be permitted to plead its own failure, to itself furnish the necessary transportation facilities as commanded by the statute, nor any undertaking on its part to furnish something beyond its legal obligations, to justify a practice which culminates in the "forbidden result" of unjust advantage and discrimination. The carrier should itself afford the transportation and perform all of its legal obligations by its own services and instrumentalities. Neither the services nor instrumentalities of the shipper should be employed in the transportation of his own freight by the carrier. Such a practice will always be a hotbed for the propagation of discriminations difficult of definite proof. The opinion of the majority fixes the cost of the service rendered by the shipper as the limit which he may be lawfully allowed. It requires no argument to show that the cost to the shipper of performing the service involved is impossible of definite ascertainment, and will vary from time to time. Yet, if by reason of caution not to reduce the allowance below cost the Commission shall leave it one-quarter or one-eighth of a cent above cost, the vice of discrimination is still there, even when tested by the rule stated in the majority report; nor is argument necessary to show that a large grain dealer, having the constant advantage of even this margin, can so far overreach his competitors as to largely monopolize and control the business.

Being convinced that the arrangement here involved necessarily results in undue advantage to Peavey & Company as against those

with whom they compete in buying grain, and particularly those who, not being elevator men, desire to ship grain to Kansas City, Omaha, or Council Bluffs for use there, or to markets beyond, without elevation at the places named, I think the arrangement is unlawful. The effort to prevent the extension of this and similar practices by admonition or advice will not prove effective. The sanction of this arrangement will prove the prolific excuse, if not the necessity, for the continuance and extension of similar devices fruitful of discrimination and friction on other lines of railway and at other places. To cut it out would cure a multitude of evils.

LANE, *Commissioner*, dissenting:

The somewhat complex Peavey interests herein involved I shall refer to as the Peavey Company, and further, for sake of simplicity, will take Omaha as a typical point. The problem presented may then be stated in this form: The Peavey Company, grain
32 buyer and elevator owner, purchases grain at country points, sends it over the Union Pacific Railroad to Omaha, where it is unloaded into the Peavey elevator. The Peavey Company pays the regular rate at Omaha, but the Union Pacific refunds 1¼ cents on each 100 pounds for unloading grain from the cars. Is the Union Pacific justified in giving this allowance to the Peavey elevator?

It was held by the Commission upon the original hearing that such an allowance, made under a special and secret contract between the Union Pacific and the Peavey Company, was legal. A motion for a rehearing was made by certain interested carriers, but before this rehearing was had the Union Pacific filed a tariff extending this allowance to all elevators at Omaha, Kansas City, and certain other points. Under this tariff the allowance is made to grain "transferred by elevators." The sole defense of the Union Pacific is that grain is in transit, and that transfer in transit is recognized by law as a part of transportation which a railroad may provide for, either by facilities of its own or by facilities which it otherwise procures.

I can justify as legal neither the Peavey contract nor the published tariff which extends the favor of the contract to a larger number of elevators. Both are discriminatory as against all shippers into Omaha, excepting those who own elevators and who, for their own purposes as grain dealers, ship the grain to Omaha and there handle it, treat it, and sell it. That this is so seems to me evident from the simplest statement of the facts. The Peavey Company buys grain on the line of the Union Pacific and takes out bill of lading, giving St. Louis as its destination. Why it takes such billing no one can explain. It receives no better rate by reason of following this procedure. The St. Louis billing is, in fact, a sham. It serves no purpose save to give color to the pretense that the grain is on its way to St. Louis and is properly subject to transfer at Omaha. Mr. Munroe, traffic manager of the Union Pacific, testified that his road handles the grain on a local way-bill to Omaha, and that upon delivery at Omaha the through bill of lading is absolutely retired. Omaha is the destination of the grain; not its

point of ultimate consumption, perhaps, but its destination from an immediate transportation standpoint. Therefore, as it goes out of the possession of the railroad at Omaha and out of the control of any carrier, it seems to me conclusive that it is not transferred in transit.

If then the service rendered is not transfer in transit, what may that service be called which the elevators perform? The prevailing opinion answers this question by calling it elevation, which it defines as unloading grain from cars into a grain elevator and loading it out again after a period of not to exceed ten days, which service, however, "like any other service offered by the carriers to shippers must be open to all on equal and reasonable terms." To this admirable definition I take no exception, but its applicability to the facts of this case is not altogether clear. Neither the provisions of the tariff nor of the contract conform to this definition. The effect of the majority opinion is to legalize the secret contract with
33 the Peavey Company. This contract certainly had nothing to do with a service "open to all." Other elevators at certain Union Pacific termini are also now entitled to the unloading allowance, but the Union Pacific in none of its tariffs offers elevation to grain shippers. It owns no elevators at these points and it holds none under lease, nor does it have an arrangement with any elevator by which the farmer or the commission man or the independent buyer may secure elevation of his grain when carried over Union Pacific rails. All that the Union Pacific has agreed to do, under the fairest construction of its tariffs, is to give to those grain shippers who are fortunate enough to control elevators at Omaha a refund of one and one-quarter cents per hundred pounds for unloading their own grain. The railroad pays the elevator man for unloading his cars, and does not pay the commission man or the miller. This is not what I would designate as an offer of elevation "open to all on equal and reasonable terms." A carrier may certainly provide for unloading "if it does so for all shippers alike," but that is precisely what, in my opinion, the Union Pacific does not undertake to do.

The argument of the prevailing opinion may be thus illustrated: Armour buys a carload of dressed meat in the West and ships it to Omaha, where he places it in a refrigerator awaiting further disposition. Most of this meat is destined to be consumed elsewhere, but he holds it in Omaha as a distributing point and for treatment. Is he entitled to an allowance for putting it into his refrigerator? Or perhaps a more perfect illustration would be the purchase of a trainload of oranges in California which are shipped into Omaha and there taken out of the cars by the owner, sorted, cleaned, and graded, and, we will assume, shipped eventually to such other markets as he may determine. Should the owner of these oranges, which come over the Union Pacific, receive a refund of a certain amount for unloading the cars at Omaha?

If the Peavey Company bought this grain for shipment directly to St. Louis, and the railroad, for the purpose of relieving its equipment at Omaha, secured an elevator to make the transfer

from its cars into those of another road, I would think it proper that the cost of such actual transfer should be borne by the road, or perhaps be divided between the two roads interested, because the grain would be always within the control and possession of the carrier and the service rendered would be but a transportation service to which all shippers were equally entitled. There are no such facts, however, presented in this case. The billing is confessedly false, the shipment is local, and the so-called transfer given is simply an incidental result of the ordinary prosecution of the grain dealer's business. No transportation service is rendered by the owner of the porperty. He does what he must do if he wishes the benefit of handling the grain—removes his grain from the car. The principle of this practice is wrong, no matter whether it extends to one elevator in a city or to all and no matter what the amount of the allowance may be. It gives a preference in rates to the elevator owner as against every one else who wishes to ship grain into that market. It is a modern modification of an ancient rebating scheme.

Cockrell, Commissioner, did not participate in the hearing or in the decision of this case.

34 EXHIBIT 3.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Decided April 14, 1908.

Upon Petition of the Chicago Board of Trade and Others for a Rehearing, the Proceeding Herein is Reopened for Further Consideration.

Davis, Kellogg & Severance for Chicago Great Western Railway Company.
Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Company.
J. W. Blythe, C. J. Green, and J. E. Kellby for Chicago, Burlington & Quincy Railway Company.
J. N. Baldwin for Union Pacific Railroad Company.
Hagerman & Koon for Peavey & Company.
John H. Marble for the Commission.

Supplemental Report of the Commission.

HARLAN, *Commissioner:*

From numerous protests and complaints that have reached the Commission since the handing down of its last decision in this proceeding on April 9, 1907, it is apparent that there has been a wide

extension among interstate carriers of the payment of the so-called elevator allowances on shipments of grain, and that there is a general feeling that the practice results in an unlawful discrimination. The Chicago Board of Trade and other interests largely concerned in the shipment of grain have asked for the further consideration of the matter. Under these circumstances we have concluded in the public interest to reopen the proceeding and to set it down for further argument on May 8 next in the hearing room of the Commission at Washington. Of this action the parties hereto have already been advised. It seems unnecessary to take further evidence and the matter will therefore be considered on the present record. It is the desire of the Commission that counsel shall again argue the general question of the legality of the contract of the Union Pacific Railroad Company with Peavey & Co. and the lawfulness of the allowances that are made to the latter company at Council Bluffs and Kanasas City under the terms of that contract.

In connection with the re-examination of these general questions the Commission desires the benefit of the views of counsel with respect to two points which have been strongly urged upon our attention and which may be stated briefly as follows:

35 1. The clipping, cleaning, grading, weighing, and mixing of grain are services that have no relation to transportation, but are of commercial advantage to the shipper of the grain. If performed or paid for by a carrier at one place where it has put an elevator under contract, as with Peavey & Co. at Council Bluffs and Kansas City, is it not an unlawful discrimination not to perform or to pay for similar services elsewhere on its line?

2. Wheat and other grains are dealt in upon the great grain markets of the country on fractions as small as one-eighth of one cent per bushel. A fluctuation of that amount often suffices to effect or prevent sales. And slight differences in the transportation rates are sufficient to turn a movement of grain from one market to another. In other words, no commodity that enters so largely into the commerce of the country is more sensitive than grain to fluctuations in price or rates. If therefore a shipper receives from a carrier, in connection with the transportation of his grain, any service or privilege that results in a benefit to him to the extent even of a small fraction of a cent per bushel, it gives him an advantage which can readily be turned to his profit. While some grain is taken directly to the mills, the bulk of the traffic must pass either through public or private elevators. A grain market can be maintained only by the use of elevators. A grain dealer must therefore have his grain unloaded into a public elevator and pay its storage charges, or must handle it in his own elevator and pay the cost of operating it. In other words, Peavey & Co., for the successful conduct of their business as dealers in grain, must either use a public elevator or provide themselves with one of their own. In either event a substantial expense item is involved. Upon these facts it is insisted that a contract, such as the one here involved, when made with a dealer in grain who handles his own wheat, results in an unlawful discrimination, whatever may be the amount of the allowance and whether it be in excess of the cost

of the service or not; for, as Peavey & Co. cannot conduct their business as grain buyers and dealers without using a public elevator and paying the cost of operation, any amount, be it small or large, contributed by the Union Pacific Railroad Company to the cost of running their elevator must necessarily operate, *pro tanto*, as a special concession in their favor. It is contended that any aid received by them from the Union Pacific Railroad Company, whether sufficient to cover the cost of running the elevator or not, even though it amounts to but a small fraction of a cent per bushel, really results in giving to Peavey & Co. a benefit which, although under the present tariffs of the Union Pacific Railroad Company is shared by other grain dealers in business at Council Bluffs, Omaha and Kansas City, is nevertheless denied to grain dealers at other points on the line of that company. Such dealers have to bear the entire burden of running their elevators, or pay for the elevation service on their grain when performed by a public elevator. And this, it is earnestly contended, is not only an unlawful discrimination against them,
36 but against the several communities in which they conduct their grain business.

In rearguing the issues herein, counsel are requested to give some consideration to these suggestions.

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office, in Washington, D. C., on the 14th Day of April, A. D. 1908.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

This cause coming on to be further heard, upon petition of the Chicago Board of Trade and others for a rehearing of the matter:

It is ordered, That the proceedings herein be reopened for further consideration, and that it be set down for further argument on May 8, 1908, in the hearing room of the Commission at Washington.

It is further ordered, That the Chicago Board of Trade may be heard herein, on its said petition, as an intervening complainant.

37

EXHIBIT 4.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Submitted May 22, 1908. Decided June 29, 1908.

Advantages that are unlawful may be enjoyed in ways that do not involve the direct payment of rebates. An allowance by the Union Pacific Railroad Company to Peavey & Company, under the contract between them, when made on their own grain which has been mixed, treated, stored, weighed, or inspected in any elevator belonging to Peavey & Company, or which has been reshipped out of any of their elevators more than ten days after its receipt therein, amounts *pro tanto* to a continuation by the Union Pacific Railroad Company to Peavey & Company of the cost of securing the commercial benefits growing out of the mixing, treating, storing, weighing, or inspection of their grain, and is an undue preference and therefore unlawful.

C. A. Severance for the Receiver of Chicago Great Western Railway Company.

Gardiner Lathrop and Robert Dunlap for Atchison, Topeka & Santa Fe Railway Company.

Hale Holden for Chicago, Burlington & Quincy Railway Company.

F. C. Dillard for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Company.

E. E. Williamson for Cincinnati Chamber of Commerce.

Henry S. Robbins for Chicago Board of Trade.

Report of the Commission on Rehearing.

HARLAN, *Commissioner:*

The history of this proceeding and the facts shown of record are set forth in detail in the two opinions that have heretofore been announced by the Commission, in 10 I. C. C. Rep., 309, and 12 I. C. C. Rep., 85. It will not be necessary therefore to make a further statement of facts. The matter has come on again for rehearing upon the petition of the Chicago Board of Trade, and upon numerous protests from other quarters, indicating an extension of the practice of making elevation allowances and alleging discriminations and other evils arising therefrom.

38 While adhering to the general principles expressed in the last report of the Commission in this proceeding, further reflection and further knowledge of the actual operation of the contract between Peavey & Company and the Union Pacific Railroad Company have led us to the conclusion that the reduction under our

previous order of the allowance of 1¼ cents per hundred pounds to three-quarters of 1 cent does not reach far enough and has not sufficed to cure the evil of which complaint was made. That reduction was made on the theory that an allowance of 1¼ cents per hundred pounds was more than the cost to Peavey & Company of the service performed on their grain and was therefore an unlawful rebate. But advantages that are unlawful may be enjoyed in ways that do not involve the direct payment of rebates. And we think that Peavey & Company do enjoy in the actual operation of their contract advantages that do not accrue to other shippers of grain. The mixing of grain is said to be one of the largest sources of profit to a grain dealer. By mixing a carload of inferior grain with a carload of grain of higher grade the aggregate value of the two carloads is increased and the dealer's profits from the sale are larger than they would be if the two carloads were sold separately. The storage of grain beyond the elevation period of ten days is also of commercial value to grain dealers. The "treatment" of grain is of advantage to them in that it results in enhancing its value. Weighing and inspection are also of advantage to the owner of the grain. As was expressly stated in our last report, such services are commercial services and are in no sense a part of elevation as defined in the act to regulate commerce. If therefore the Union Pacific Railroad Company pays to Peavey & Company an allowance of three-fourths of 1 cent, or of any other amount however small, on grain belonging to them which has been mixed, treated, stored, weighed, or inspected in their elevators, it amounts *pro tanto*, to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing these commercial results and benefits. The allowance therefore not only results in an undue preference when paid on grain belonging to the owner of an elevator thus under contract, but, in effect, is also an unlawful rebate, unless confined to grain that is reshipped within the elevation period of ten days and has not been mixed, treated, weighed, or inspected.

No way has been suggested by which the Union Pacific Railroad Company may avail itself of the Peavey elevators under the contract in question without giving to Peavey & Company and to their grain the commercial advantages alluded to, and these advantages we regard as an undue and an unlawful preference. We therefore hold that the practice of the Union Pacific Railroad Company in paying to Peavey & Company an allowance under such circumstances upon their own grain is unlawful. An order will be entered in accordance with these views.

Prouty, Commissioner, concurs in the result and Lane, Commissioner, concurs in the conclusion that the allowance is unlawful.

39 *Order.*

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 29th Day of June, A. D. 1908.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Upon the foregoing report—

It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required forthwith to cease and desist for a period of two years from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs (or on grain so received in any of said elevators in which they have any direct or indirect ownership or interest) that is not reshipped out of said elevators within ten (10) days after it has been received therein; and to cease and desist from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs.

40 EXHIBIT 5.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

SAME
v.
MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME
v.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME
v.
ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY.

No. 1267.

SAME
v.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Submitted December 4, 1907; Decided June 29, 1908.

1. A railroad company by granting a privilege which, although ostensibly open to the whole public, can, in the nature of things, only be taken advantage of by certain shippers, creates thereby a discrimination which may or may not be undue, according to the circumstances in each case.
2. The payment of an elevation allowance of ¾ of 1 cent per 100 pounds to elevators located upon the Missouri River is an undue and unlawful discrimination.

J. C. Lincoln for complainant.

Hale Holden and O. M. Spencer for Chicago, Burlington & Quincy Railroad Company.

E. B. Peirce for Chicago, Rock Island & Pacific Railway Company and St. Louis & San Francisco Railroad Company.

A. G. Cochran and F. A. Cline for Missouri Pacific Railway Company.

J. M. Bryson for Missouri, Kansas & Texas Railway Company.

41 *Report of the Commission.*

PROUTY, *Commissioner:*

The above cases all involve the same question and were heard together, the subject of controversy being the so-called elevator allowance or transfer charge paid by the defendants at the Missouri River. The petition is filed by the Traffic Bureau, Merchants' Exchange of St. Louis, an organization of the business interests of that city, and is in favor of the handlers of grain at that market. The exact point raised will be best understood by a brief statement of the manner in which grain is handled and an application of these methods to a particular shipment.

Grain in the states west of the Missouri River is usually bought in the country by the country elevator. In such case, the price of the grain is agreed upon and the grain is weighed and taken into the elevator, the transaction being thus completed so far as the farmer is concerned.

It sometimes happens that the farmer puts his grain on store in the elevator, subject to order for future shipment, and he also sometimes sells to what is known as the "track buyer," in which case the grain is delivered not into an elevator, but directly from the wagon into the car.

The owners of country elevators often have what are known as terminal elevators located at primary markets, into which and through which they handle grain from their country houses, but it also often happens that the country elevator has no such connection with any terminal elevator. In this event the grain is either sold f. o. b. the car at the country station or is shipped to some market to be disposed of. In either case it is usually sold upon the grade, inspection, and weight of the market to which it is shipped. All grain shipped to a particular market to be sold and settled for according to the grade, inspection, and the weight of that market must of necessity be elevated, since it can not, as a practical matter, be weighed in any other manner.

It will be seen, therefore, that in the ordinary course of business all grain must be elevated at the market upon which it is handled, excepting only such grain as is sold in the car for shipment beyond. This grain may be sold upon sample or it may be inspected and graded in the car. It can not be weighed, and the amount of the grain so dealt in is small. There is another and more important exception, viz., grain bought by the mill directly from the field.

The defendants, acting upon a decision of this Commission in the so-called Peavey case—In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., 12 I. C. C. Rep., 85—have established what they term a transfer charge, but what is ordinarily known among grain men as an elevator allowance at the Missouri River of ¾ of 1 cent per 100 pounds. The railway tariff provides that this payment shall be made to the elevator performing the service and not to the owner of the grain; but the testimony in the

case before us shows that, as a practical matter, the operator of the elevator at Missouri River points is almost without exception the owner of the grain, so that in fact the application of this tariff enables the grain owner at the Missouri River to obtain from the rail-
42 road company ¾ of 1 cent per 100 pounds upon all grain shipped by him into that market. The same result follows if the owner of the grain is not also the owner of an elevator, since the elevator which performs the service will give him the benefit of the ¾ of 1 cent which it obtains from the railroad company.

This allowance is treated upon the tariffs of the railroad companies as a transfer charge and is never paid unless the grain is shipped out of the elevator. In the case of the Union Pacific Company the charge is paid by that company upon satisfactory evidence that the grain has gone forward. All other railroad companies operating west of the Missouri River have lines extending beyond that river to the east, and it is for the interest of those companies that the grain should be carried beyond over their own lines. The rails of the Chicago Great Western and certain other lines begin at the Missouri River, and unless the grain is elevated and sent forward from that market these lines receive none of the business. These competitive conditions compel the payment by all lines of the same allowance made by the Union Pacific, but the payment is made in all other instances by the outbound and not by the inbound carrier.

If, now, we apply the published tariffs of these defendants, including this elevation allowance or transfer charge, to an actual movement of grain through an elevator at Omaha as compared with a similar movement through an elevator at St. Louis, the discrimination complained of becomes manifest. For this purpose we will assume a shipment from point A in Nebraska to the consumer at point B in Illinois. The rate from A to Omaha is 10 cents, from the Missouri River to St. Louis 9 cents, and from St. Louis or the Mississippi River to B 5 cents.

If, now, the consumer at B should himself purchase a carload of grain at A, the cost of transporting that grain would be 24 cents per 100 pounds. In point of fact, the consumer at B seldom, if ever, buys in the country at A, but for various reasons which need not be stated he purchases of an intermediate grain man at some point like Omaha or St. Louis. We will assume first that the carload is handled through Omaha and that the grain dealer at Omaha owns and operates an elevator.

The rate paid in this case, as before, is 10 cents to Omaha, 9 cents to the Mississippi River, and 5 cents to B, making a through transportation charge of 24 cents; but the grain dealer at Omaha now receives from the railroad company an allowance of ¾ of 1 cent. As between himself and the railroad, therefore, he has paid but 23¼ cents per 100 pounds.

Assume, now, that the shipment, instead of passing through the elevator at Omaha, is handled by a grain dealer who also owns and operates his own elevator at St. Louis. This dealer pays this same transportation charge, 10 cents to Omaha, 9 cents to St. Louis,

and 5 cents to B, making 24 cents, and he receives nothing whatever from the railroad company.

It is perfectly evident that it costs the St. Louis grain dealer just ¾ of 1 cent per 100 pounds more to lay this grain down at B than it costs the grain dealer at Omaha, if we assume that the expense of operating the elevator at Omaha and at St. Louis is the same.

43 In point of fact, the grain dealer at St. Louis does not usually own his elevator, but uses the public elevator, paying for this service one-half cent per bushel, or slightly more than ¾ of 1 cent per 100 pounds, but the same result must follow if we assume that the grain dealer at Omaha, instead of owning and operating his elevator, procures the service from some other elevator, for in that case the railroad company would pay the elevator ¾ of 1 cent per 100 pounds, and the elevator would perform the service without charge to the Omaha dealer.

In whatever way the matter is considered, it must be evident that the dealer upon the Missouri River has the advantage of the dealer at St. Louis by exactly the amount of this elevation charge, everything else being equal.

There can be no doubt upon the above facts that this elevation allowance works a discrimination against the market of St. Louis and in favor of the markets at various Missouri River points where the allowance is made. The real question is whether that discrimination is undue, and therefore unlawful, and what, if so, the Commission can do to remove it.

These defendants all place their defense upon the ground that competitive conditions, not existing at St. Louis, force the payment of this elevation allowance at the Missouri River. They assert that the Union Pacific, acting under the decision of the Commission in the Peavey case just referred to, pays at Omaha and at Kansas City this allowance of ¾ of 1 cent, and that other competing carriers are obliged to make the same allowance. Since there is no such competitive condition at St. Louis, they are not compelled to pay this charge, and therefore decline to do so.

It is probably true that the payment of an allowance of this sort by one railroad at Omaha or Kansas City would force a similar payment by competing carriers, and this Commission has itself held that if a carrier pays this charge at Kansas City, it can not decline to pay it at Atchison. Atchison v. Missouri Pac. Ry. Co. et al., 12 I. C. C. Rep., 111. It may well be, therefore, that the action of the Union Pacific at Omaha and Kansas City does force the payment of this allowance at the Missouri River markets, and it becomes proper, therefore, in the light of the present record, to reexamine our decision in the Peavey case upon which these payments are justified by the defendants.

That proceeding was originally undertaken by the Commission upon its own motion, but in consequence of the suggestion of certain competing carriers. It had been alleged that the Union Pacific under a secret contract with Peavey & Company was paying to that company certain allowances for the unloading of grain, which

amounted to a rebate in violation of the act to regulate commerce. The facts as developed in that investigation and upon which the Commission based its decision were these:

44 The Union Pacific Railroad, in the operation of its lines which lead into and stop at Omaha and Kansas City, found it necessary to provide at these points warehouses into which grain shipped by them from the fields of Nebraska and Kansas could be unloaded so that their own cars might be released and promptly returned, and from which the grain could be loaded into cars of its connections when it went forward toward the east. Instead of erecting and operating such warehouses itself, it had entered into a contract with Peavey & Company by which that company provided these facilities. The Commission found, nor could there be any doubt as to the accuracy of these findings, both from the testimony of the Union Pacific and of other carriers operating to the west of the Missouri River, that previous to 1899, when the contract was executed, and at that date, it was absolutely essential in the operation of the Union Pacific Railroad to provide such storage and transfer facilities at Omaha and in a less degree at Kansas City, and that the Union Pacific had entered into this contract with Peavey & Company in good faith and for the sole purpose, not of giving to Peavey & Company any undue or illegal preference, but of providing those facilities which it must otherwise have furnished for itself. We further found, and the testimony was not fairly doubtful upon this point, that the price specified in the contract of 1¼ cents per 100 pounds was not unreasonably high. Upon this statement of facts we held that the execution of the contract was legal and that the payments under the contract were not in violation of the act to regulate commerce.

It will be noted that Commission treated this purely from the standpoint of the railroad as a storage and transfer proposition. The opinion points out that the contract is for the advantage of Peavey & company, since in its actual workings the service of storage and transfer performed by that company for the Union Pacific Railroad was to a large extent one which Peavey & Company as grain dealers must perform for themselves, so that they were to this extent paid for the handling of their own grain. But the Commission called attention to the fact that the result of this advantage to Peavey & Company had not been sufficient to provoke protest from the competitors of that company, since not competing grain dealers but competing railways had brought the matter to the attention of the Commission and were present before the Commission urging that the contract be condemned. The last paragraph of the opinion of the Commission in the original case is as follows:

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to [illegible] the relations thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated because any

resulting discrimination may not be undue, but the situation created can not be wholly satisfactory. Under existing conditions
45 the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

The whole case fairly shows that the Commission then realized that the operation of this contract might result in such discrimination in favor of Peavey & Company as would be undue and therefore unlawful, but were of the opinion that upon the record before us no such quality of undueness had been made to appear.

It should be further noted that this report of the Commission was promulgated before the decision of the Supreme Court of the United States in Interstate Commerce Commission v. Chesapeake & Ohio Ry. Co., 200 U. S., 361. While there could be no question as to the necessity of these transfer facilities at the time the contract was made, it was evident that they were much less needed when the case was heard, in 1903, so that there might have been some ground for claiming that while this contract was lawful when made it had become unlawful. But the Commission hesitated to say, even if that were true, that a contract which was not only legal but apparently justifiable at the time of its execution and upon the strength of which investments had been made could become illegal by change of conditions. That case holds apparently that whenever the execution of a contract violates the provisions of the act to regulate commerce the contract itself becomes void and its performance unlawful.

When the Peavey case came before the Commission the second time every condition in any sense controlling had changed. In the Matter of Allowances to Elevators by the Union Pacific Railroad Company, 12 I. C. C. Rep., 85.

While the Union Pacific as an operating company still found it desirable and at times, perhaps, necessary to have at Omaha elevators into which its cars could be unloaded and thereby released, still its equipment then passed freely onto the lines of other railroads and the equipment of other railroads moved freely over its lines. It appeared in the testimony that cars coming in from the field were frequently unloaded into the elevator and then loaded out for the east without being switched from the elevator. It also appeared that a great number of its cars coming into the elevator from the west were of foreign equipment. Elevators had multiplied at Omaha, and the Union Pacific Company, even if the Peavey elevator had not been in existence, would have found no occasion at the time of

our last report, in April, 1907, to construct an elevator of its own at that point.

46 The change in the traffic situation was even more marked than that in operating conditions. In 1903 the rate from a point in Nebraska, where this grain originated, through Omaha to some eastern market was less than the sum of the rates to Omaha and from Omaha. If the Union Pacific handled this business through Omaha, as it must, it was necessary to do so upon a joint through rate and as a strictly through proposition. It was, therefore, in fact as well as in theory necessary that it should in some way provide for the transfer of the grain from its cars to the cars of its connections. In 1906 this was not so. After a period of warfare the Chicago Great Western had secured the adoption at Omaha of the same system of rate-making which had long prevailed at Kansas City, so that the combination upon Omaha was the same as the through rate via Omaha or via any point across the Missouri River around Omaha. Commercially it was certain that the grain would subsequently go forward for the most part to some other destination, for the consumption at Omaha was small in comparison with the total receipts, but from a transportation viewpoint the service was a strictly local one upon a local bill of lading and under a local rate. The Union Pacific neither knew nor cared what the subsequent destination of the grain was. Hence the interest of that company in the transaction had changed. Before it had been essential that this grain should be brought to Omaha upon a through rate and sent forward upon that rate. Now it was only essential that it should be marketed at Omaha. Conditions must be so adjusted as to make it desirable for the owner to ship his grain into Omaha rather than to ship it via some through line around Omaha; and these conditions were met when Omaha became a grain market—in other words, when the grain was elevated by the owner at Omaha.

For the purpose of accomplishing this end the Union Pacific Company had extended its payment of this 1¼ cents to all elevators at Omaha or Council Bluffs which performed this service. In other words, it now made payment of this sum not by virtue of any contract with Peavey & Company, but in the adoption of a policy which would secure the handling of the grain at that point.

While the case presented upon the second record was entirely different from that presented upon the first and must be disposed of upon entirely different considerations, it still seemed to a majority of the Commission that the payment of these allowances ought, under the circumstances, to be permitted. The reasons which moved the writer of this report to that opinion are not fully stated in the report then published, and may be briefly given here.

It is evident that the discrimination arising out of the payment of such an allowance might be of several different kinds, and for the purpose of defining these varieties of preference we may take the concrete case of a payment to Peavey & Company.

(*a*) That company might derive an advantage from the fact that the amount paid for the service was greater than the cost of the

service itself. If they received more than the expense to them, they would manifestly obtain an advantage over a competitor who did not perform the service by exactly the amount of difference between the sum paid and the cost to them.

47 Now, when we reduced the charge from 1¼ cents to ¾ of 1 cent per 100 pounds it seemed reasonably certain that we had eliminated that source of discrimination, if it ever existed, since the evidence in the Peavey case, as well as in other cases before the Commission, strongly tended to show that the fair cost of performing this service equals or exceeds the latter sum. It should be added, however, that information coming to the Commission since indicates that even ¾ of 1 cent may be too high.

(*b*) There is an entirely different discrimination arising from the fact that Peavy & Company as grain dealers must have these facilities of elevation; that the service which they perform for the railroad company also involves a service necessary to themselves as grain handlers, and that therefore the railroad pays them for a service in connection with their own grain, which their competitor must furnish at his own cost. This is perfectly seen by assuming that some elevator is located upon the line of the Union Pacific at Omaha or Council Bluffs which does not receive the allowance.

It must be kept in mind that this elevator service is absolutely essential to the business of Peavey & Company. They could not transact a grain business at Omaha without it. The evidence shows that practically all the grain handled into the elevator is their own; hence the service which they perform in storing and transferring this grain for the Union Pacific differs in no respect from the service which they would perform, except in rare instances, if they were not operating under this contract.

The competitor of Peavey & Company also owns a line of country houses upon the Union Pacific with a terminal elevator located at Omaha and performs for the Union Pacific in the handling of its business exactly the same service as does Peavey & Company, and probably at substantially the same expense; yet Peavey & Company are paid 1¼ cents per 100 pounds while their competitor receives nothing at all. This allowance, as we have already seen, is often more than the entire profit from the handling of the grain; hence, as a practical matter, there arises in the working out of this contract a discrimination in favor of Peavey & Company as against other elevators at Omaha.

Now, when the Union Pacific Company extended the payment of this elevator allowance to all elevators in Omaha it thereby removed this second form of discrimination. The competitor of Peavey & Company at Omaha or Council Bluffs would now receive exactly as much as was paid to that company under its contract, and hence payment under that contract no longer worked discrimination between the owners of elevators. Under our second holding, as applied to conditions then existing, neither the first nor the second form of discrimination could exist.

(*c*) A third discrimination still remains. While this is termed a transfer charge upon the tariff and is only paid upon grain which

actually moves out from Omaha, it is, in fact, under actual
48 conditions, an elevator allowance, and is paid by the Union Pacific for the purpose of inducing the elevation of grain at Omaha. In other words, the Union Pacific pays for the unloading of a carload of grain when discharged into an elevator and requires the consignee to pay for the unloading if that grain is unloaded by any other means. This is a clear discrimination in favor of the elevator against the consignee who does not employ the service of an elevator in the unloading of his grain.

It sometimes happens that grain is sold for shipment beyond, without being unloaded at Omaha. This business is transacted by a commission man who comes into competition with the dealer operating through the elevator, and generally the owner of the elevator. Here is a plain preference in favor of the elevator and against the shipper who has no occasion to employ that facility. The same discrimination would arise against a shipper who, though desiring to use an elevator, did not wish to use it at Omaha.

The existence of this form of discrimination was clearly apparent upon the hearing and is prominently referred to in the reports of both dissenting Commissioners. It did not seem to the writer at that time a sufficient ground for holding the payment of these allowances to be unlawful. Railways can not be operated without more or less discrimination. The act to regulate commerce does not attempt to prohibit all discrimination, but only that which is undue. It was the opinion of the writer that under all the circumstances this discrimination ought not to be held undue, for the following reasons, among others:

Elevation facilities are absolutely essential to the proper handling of grain. There must be the country elevator and the terminal elevator; and it is for the interest of all parties—producer, carrier and consumer—that these facilities shall be ample. In no other way can the farmer dispose of his product and obtain his money for it when he desires. In no other way can the railroad economically handle this grain from the producer to its final destination. In the interest of the general public, therefore, the construction of ample elevator capacity should be in all proper ways encouraged.

The Union Pacific has a special and peculiar interest in the existence of extensive elevator facilities at Omaha. As repeatedly said, its eastern terminus is here. Its haul of grain from the country station is comparatively short. If its cars can be promptly unloaded and promptly returned to the field this grain can be moved by it when desired. Otherwise, if its equipment goes beyond its own lines, delays and congestion may occur. It is perfectly plain that, looking at this matter from a purely operating standpoint, the interests of the Union Pacific demand ample storage facilities at Omaha and Council Bluffs, into which grain can be temporarily put when operating conditions are such that it can not be sent through to some more distant point.

This is true in the case of the Union Pacific, not only from the operating but also from a competitive standpoint. That company can not handle grain into Omaha from the field in competition with

lines leading through Omaha unless the grain can move by its line to its final destination with the same convenience that it
49 moves by other lines; and this can only be true when the grain is brought into the Missouri River and unloaded at that point. The traffic situation, therefore, of the Union Pacific demands that it shall encourage a system of handling this grain which involves the unloading of the grain both by itself and its competitors at the Missouri River.

The same thing is true, viewed as an outgoing proposition, from the standpoint of a railway, like the Chicago Great Western, whose western terminus is at Omaha. Grain brought to Omaha goes almost entirely to some point of consumption east. If the Chicago Great Western is to obtain a part of this competitive business it must do so by taking it from the elevators at Omaha. It can not be expected that these through lines, operating both east and west of the Missouri River, will bring the traffic to Omaha and there deliver it to the Great Western. Competitive conditions, therefore, imperatively require the Chicago Great Western to promote such traffic and commercial conditions as will enable it to secure a portion of this business; in other words, it must bring it about that this grain is elevated and reloaded at the Missouri River.

The purpose of the Union Pacific is not served by reducing the rate into Omaha, for that is met by every other line; nor is the purpose of the Great Western accomplished by making a lower rate from Omaha, which must be made by all lines. What these companies desire is the unloading and reloading of this grain at Omaha, and this can only be accomplished by promoting in some way the building and operation of elevators at that point.

Now, it seemed to the writer that the Union Pacific in the just conservation of its interests, that the Chicago Great Western in the legitimate development of its business, might make this elevation allowance at Omaha, and therefore that the discrimination caused by the payment of this allowance ought not to be pronounced undue.

There was still another consideration of some weight. About the only competition between carriers in the transportation of grain had arisen in respect of these elevation allowances. The payment of such allowances amounts to a reduction in the rate which must finally inure to the benefit of the producer and the consumer. To cut out this allowance and all similar allowances and privileges would be to increase in effect by a very large sum in the aggregate the transportation charges of this country, and we might well hesitate to do this unless it were found absolutely necessary.

In the light of what has transpired since our decision, and as a result of that decision, and in view of what must inevitably happen if we adhere to it and apply it, we are constrained to now hold that this elevation allowance is an undue discrimination which should be prohibited.

It long since became clear that the public had nothing to gain in the way of transportation charges from our recognition of the propriety of these payments. Soon after the submission of the Peavey

case the last time, carriers operating from the Missouri River,
50 becoming convinced that the Commission would sustain the legality of the Peavey contract, and realizing that they must therefore establish similar allowances, advanced their rates 1¼ cents per 100 pounds upon the theory apparently that the elevation allowance would equal that amount. When the Commission published its opinion allowing ¾ of 1 cent per 100 pounds, the carriers promptly put in elevation to that extent. The net result to the public was therefore a loss of ½ cent per 100 pounds, and the shipper is still poorer by that amount.

It has also become perfectly apparent that whatever may have been true when the Peavey contract was entered into, or when the original hearing in that case was had, or even at the time of the second report, this payment is no longer in any sense intended to cover the expense of a transfer. It is an elevator allowance, pure and simple, made to the owner of the grain if he elevates that grain upon the Missouri River, and for the purpose of persuading him to elevate it at that point. While paid nominally to the elevator, it turned out in testimony in the present case that practically without exception the operator of the elevator into which the grain was unloaded was the owner of the grain itself. If a case should arise where the owner of the grain was not also operator of the elevator, he might still, if he required this elevator service, obtain it for nothing, since the elevator would give him the service upon receiving from the railroad company the ¾ of 1 cent.

The traffic representatives of these defendants all testified that they paid this sum, not as a transfer charge, not because they had occasion to use a transfer, but because they were compelled by competitive conditions.

This is now regarded by the shipper as an elevator allowance. It is paid by the railway as an elevator allowance, and we must regard, when disposing of this question, not the circumstances under which the practice may have originated, but the facts as they now exist. What does not seem to have been clearly apprehended in the former discussions of this subject is the importance of this allowance, the extent to which it would be felt, and the impossibility of controlling it in any other way than by prohibiting entirely such payments. Nothing can more clearly show this than the cases which are now pending before this Commission.

Take the facts disclosed by the present record. For years these defendant carriers have maintained a certain relation in rates from the fields of production west of the Missouri River to Kansas City and St. Louis. The rate from the field to St. Louis has been the local to the Missouri River plus the local from the Missouri River to St. Louis. Under this adjustment of rates it has been possible to move grain through either the markets at the Missouri River or St. Louis to eastern destinations upon the same terms as to cost of transportation. Today this relation has been altered. Grain can be moved to eastern points for ¾ of 1 cent per 100 pounds less through Kansas City than through St. Louis. This is plainly unjust and should be corrected. Why not remove this discrimination by commanding the

defendants to make the same allowance at St. Louis as at Kansas City?

51 At the present time grain destined for certain parts of Texas and for certain portions of the south receives at St. Louis an elevation allowance of ¾ of 1 cent per 100 pounds. By tariff becoming effective since the hearing, lines leading east from St. Louis now allow an elevation fee of ¼ of 1 cent per bushel on outbound shipments. If, therefore, these defendants are required to pay ¾ of 1 cent allowance at St. Louis, that market will thereby acquire an advantage over the Missouri River. Could we, in order to avoid this result, say that the defendants need not pay an allowance at St. Louis so long as lines leading out did so; or that the allowance made by them at St. Louis should not be the same as that paid upon the Missouri River, but only sufficient to equalize conditions at these two markets? Could we hold that so long as the Baltimore & Ohio granted the allowance from St. Louis the Missouri Pacific need not apply it to inbound shipments; but that should the Baltimore & Ohio at any time withdraw its tariff upon the outbound shipment then the Missouri Pacific must apply its allowance upon the inbound?

Consider the mill located at B, in Illinois, to which the shipment from A, in our original illustration, was supposed to be made. Assume that the miller, instead of buying his grain from the elevator at St. Louis or at Omaha, elects to go into the field and purchase from the farmer. Is there any reason why this shipper should pay more for a less service than the grain dealer at Omaha, simply because the miller does not require and can not use elevation at that market?

Consider the mill located at Omaha itself. What imaginable reason is there why grain should be taken to an elevator in Omaha and unloaded at ¾ of 1 cent per 100 pounds less than it will be taken to the mill and unloaded, when every physical incident of the two transactions is the same.

The effect of these allowances upon the milling industry is more clearly seen by reference to the mills located west of the Missouri River. There are, for example, large milling interests in southern Kansas, and these mills buy directly from the field. In the past they have competed with mills east of the Missouri River which have bought their grain through elevators located at those markets. Today all these mills to the east of that river enjoy the benefit of free elevation, or of an elevation allowance which is equivalent to free elevation, and which is ¾ of 1 cent per 100 pounds. As compared with a year ago these mills to the east of the Missouri River have acquired an advantage in the purchase of their raw material over the Kansas mills, which buy directly from the producer, of ¾ of 1 cent per 100 pounds.

The Commission now has before it a complaint from a company operating a terminal elevator some 40 miles west of the Missouri River. This company sells grain which passes through this elevator in competition with grain elevated at the Missouri River. The evidence clearly shows that without this allowance this concern

must go out of business at that point. This allowance must extend, therefore, not only to the east but to the west.

52 It is said that we ought not to prohibit the payment of these allowances for the reason that we can not prevent the granting of free elevation, and that to prohibit the allowance by railways not owning elevators while their competitors who do operate elevators can grant to their shippers free elevation would be unjust. If it be true in fact that *that* free elevation can not be prevented, we should certainly hesitate to attempt to prohibit the payment of the allowance. If the Great Western Railway, owning as it does an elevator at Omaha, can give free elevation, every other line must also construct and own an elevator at this point. The business of elevation would be entirely done by railroad elevators, and every private establishment of that kind would be virtually confiscated.

But we do not by any means concede that free elevation can not be prohibited. Upon the contrary, there is no difference in principle between the giving of the service and the giving of the money with which to buy the service, and we have no doubt that this Commission has the same jurisdiction to prohibit the granting of the free service which it has to prohibit the payment of the allowance.

It is without doubt the right of the Union Pacific Company to provide at Omaha storage facilities into which its cars can be unloaded and thereby promptly released. That company may without question provide for the transfer of grain from its own cars to the cars of its connection when that is necessary to complete a through shipment. It can provide these facilities either by an outlay upon its own part or by contracting for the performance of the service at so much per bushel. This service pertains entirely to the transportation of the grain. The shipper has no possible interest in it, and it is entirely immaterial to him by what means that is effected, provided the service of transportation be properly performed.

If, however, the Union Pacific Company gives to the shipper over its line the privilege of securing for nothing an official weight and inspection of his carload of grain; if it issues to him a certificate by which it agrees to hold a certain amount of grain of a certain grade at the pleasure of the shipper and send that grain forward to whatever destination the shipper names, an entirely new element is introduced into the transaction. This is not an incident of transportation, nor is it performed for the benefit of the carrier. It is a part of the grain dealer's business, is for his benefit, and is of value to him. If it is accorded to one dealer and not to another, a preference in favor of the dealer who receives it arises. This service the railroad company has no right to render free when this works an undue discrimination against other shippers.

It is true that this service costs the railroad company but little and is of much greater value to the shipper who receives it. This goes to the convenience and not to the quality of the transaction. It may be in the interest of economy that the carrier should render this service for the shipper. We do not now hold that commercial elevation may not properly be furnished by a railroad, but we do

hold that such elevation must be charged for at what it is reasonably worth.

53 We hold that a railroad company by extending a privilege of value to one member of the shipping public, when that privilege in the nature of things is not desired and can not be used by other members of the public, is thereby guilty of a discrimination in favor of the one who can and does use the privilege. This discrimination may or may not be undue, according to the circumstances of each case. In the great majority of instances such discriminations are not in fact unlawful. But upon the facts now before us the granting of free commercial elevation or the payment of an elevation allowance must be held an undue discrimination and therefore unlawful. Such an allowance by the Union Pacific at Omaha is not open to the whole public, but only to those members of the public who have occasion to use an elevator at Omaha.

The defendants in this case will be ordered to cease and desist from such payments at Kansas City and other Missouri River points. In order that sufficient time may be allowed to prevent any disturbance of business conditions this order will not take effect until October 1, and the tariffs of the defendants withdrawing the allowance must be filed upon thirty days' notice.

HARLAN, *Commissioner*, concurring:

I concur in the disposition made by the Commission of these complaints but not in all the inferences that may be drawn from what is said in the opinion. I am not willing to be understood as entertaining the view that a railroad company may not exercise its own discretion in providing necessary facilities for the conduct of its transportation and the management of its terminals and equipment; and may not for that purpose provide elevation for its grain shipments free of charge. As the term is used in the act I understand it to mean substantially a transfer of the grain from the car of the inbound carrier through an elevator to the car of the outbound carrier within a period of ten days. And in such elevation I see nothing either preferential or discriminatory whether done in an elevator operated by the carrier or in an elevator operated for it by the owner. But I agree that any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed, or otherwise treated in the process of elevation is unlawful. As a facility for the convenience of the carrier free elevation is unobjectionable; but when the owner is permitted to and does use the elevation as a transit privilege for himself by means of which to secure commercial advantages on his own grain, the result is an unlawful preference and discrimination. This is expressly so stated in the proceeding entitled In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., *ante*, p. 315, and, in substance, in the opinion of the Commission in the same case reported in 12 I. C. C. Rep., at p. 85.

I am requested by Commissioner Clark to say that he concurs in this view.

54

Exhibit 6.

Unpaid Claims of Omaha Elevator Company Against Union Pacific R. Co. for Elevation and Transfer Charges.

(*a*) Prior to June 29, 1908.

Claim No.—	Date.	Pounds.	Amount due. At ¾ cts.	Amount due. At 1¼ cts.
900	June 1, '08	6,623,280	$496.75	$827.91
931	June 30, '08	3,058,650	229.40	382.30
917	June 16, '08	10,144,000	760.80	1,268.00
		19,825,930	$1,486.95	$2,478.21

(*b*) From June 29 to Oct. 1, 1908.

Claim No.—	Date.	Pounds.	Amount due. At ¾ cts.	Amount due. At 1¼ cts.
938	July 15, '08	2,367,690	$177.58	$245.96
954	Aug. 12, '08	1,265,000	94.87	158.13
957	Aug. 17, '08	10,592,000	794.40	1,324.00
972	Sep. 2, '08	4,059,000	304.42	507.38
1007	Oct. 5, '08	17,844,270	1,338.32	2,230.54
		36,127,960	$2,709.59	$4,516.01

Exhibit 7.

Claims of Midland Elevator Co. Against Union Pacific R. Co. for Elevation and Transfer Charges.

(*a*) Before June 29, 1908.

Claim No.—	Date.	Pounds.	Amount due. At ¾ cts.	Amount due. At 1¼ cts.
25	July 10, '08	2,029,720	$152.22	$253.70
27	Dec. 18, '06	1,951,880	146.37	243.98
28	Jan. 17, '07	1,906,390	142.58	238.30
29	Jan. 17, '07	983,990	73.80	123.00
61	May 28, '08	1,295,300	58.26	97.14
62	Jun- 11, '08	2,615,780	117.69	196.18
63	Jun- 10, '08	2,785,200	125.31	208 89
		11,538,540	$816.69	$1,361.19

(*b*) From Midland Elevator Co., June 29, 1908, to Oct. 1, 1908.

Claim No.—	Date.	Pounds.	Amount due. At ¾ cts.	Amount due. At 1¼ cts.
26	Aug. 22, '08	432,000	$32.40	$54.00
27	Aug. 27, ,08	420,000	31.50	52.50
64	Aug. 5, '08	3,250,730	243.80	406.34
65	Aug. 19, '08	2,398,180	179.86	299.77
66	Aug. 22, '08	4,494,930	337.11	561.86
67	Aug. 27, '08	7,590,420	569.28	948.80
68	Oct. 9, '08	14,015,120	1,051.13	1,751.89
		31,749,380	$2,445.08	$4,075.10

55 Afterwards, to wit, on the 2nd day of November, 1908, an Appearance of the Interstate Commerce Commission was filed. Said Appearance is in words and figures as follows:

WASHINGTON. *October* 30, 1908.

Clerk Circuit Court of the United States, Western Division of the Western District of Missouri, Kansas City, Mo.

DEAR SIR: Kindly enter my name as Solicitor for the Interstate Commerce Commission in Equity case No. 3405, F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, Complainants, vs. Union Pacific Railroad Company and Interstate Commerce Commission, Defendants.

Kindly Advise concerning date answer in said case must be filed under the regulations in your office.

Very respectfully yours,

P. J. FARRELL, *Attorney.*

56 Afterwards, towit, on the 2nd day of November, 1908, a Certificate of Attorney General was filed. Said Certificate is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

F. H. PEAVEY AND COMPANY et al.

v.

UNION PACIFIC RAILROAD COMPANY and INTERSTATE COMMERCE COMMISSION.

To the Clerk of said Court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by *the* F. H. Peavey and Company et al. against the Union Pacific Railroad Company and the Interstate Commerce Commission, under the Act of Congress entitled "An Act to regulate commerce," as amended by the Act of June 29, 1906, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in Section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Eighth Circuit, to the end that said case shall be given precedence over other cases in said court,

57 and be assigned for hearing at the earliest practicable date be-

fore not less than three of the Circuit Judges of said Circuit, as is provided by the said Act of February 11, 1903.

CHARLES J. BONAPARTE.
Attorney General.

Washington, D. C., October 31, 1908.

58 Afterwards, to-wit, on the 16th day of November, 1908, the answer of the Union Pacific Railroad Company was filed. Said answer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405. In Equity.

F. H. PEAVEY AND COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, JAMES S. HARLAN, and EDGAR E. CLARK, Members Composing the Interstate Commerce Commission, Defendants.

The Answer of the Union Pacific Railroad Company to the Bill of Complaint.

This defendant reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill comes and answers to so much thereof as it is advised is material to be answered, and says:

I.

It admits that F. H. Peavey and Company, Omaha Elevator Company, Midland Elevator Company, and Union Pacific Railroad Company are incorporated as is in said bill alleged, and are citizens of the States as alleged, and that a principal operating office of Union Pacific Railroad Company is at Kansas City, Missouri. It admits that Interstate Commerce Commission is organized and exists as is by complainant pleaded; and that this suit is one arising
59 under the constitution and laws of the United States, wherein is involved a controversy between citizens of different states; and that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000.00).

II.

This defendant admits that Frank H. Peavey was, in the year 1899, and for years prior thereto, a large dealer in grain, operating in the territory traversed by the Union Pacific Railroad Company, buying grain at points of production and forwarding to eastern and foreign markets. It admits that he died in year 1901, and that his legal representatives organized the several corporations complainant; and that all the rights of Frank H. Peavey and Company, of which he was a member, under the contract by complainants pleaded, passed to complainants.

III.

This defendant admits that it and its predecessors in title have for several years operated, and still operate, an extensive railway system in the States of Nebraska, Kansas, Colorado, Wyoming, and Utah; one main line of which extends from Ogden, Utah, to Council Bluffs, Iowa, and another from Denver, Colorado, to Kansas City, Missouri; that these lines traverse great grain producing territory, and that the lines of this defendant toward the east terminate at the Missouri River. It admits that it is in competition with great railway systems whose lines extend from the same territory west of the Missouri River to the markets east and south of the Missouri River and the Great Lakes. It also admits there are other lines of railway having tracks extending from the Missouri River on the west to eastern markets. It admits that the States of Nebraska and Kansas constitute the heart of the grain production of the United States; that a large portion of this grain is tributary to the Union Pacific Railroad on its way to eastern and foreign markets. It admits that if this grain is carried to destination in cars of the Union Pacific
60 Railroad, in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific Railroad has no control. It admits that under these circumstances the cars would have to leave the originating road for considerable periods of time. It admits that under these circumstances it would be deprived of the use of its cars for indefinite periods of time. It admits that the movement of grain is confined to a comparatively short season, and that during the season there is a pressing demand for cars. It admits that it has made large additions to its car and locomotive equipment, but has frequently been unable to meet the requirements of the shippers. It admits it could ill afford to permit its cars to pass from its control and be absent for uncertain periods in order to carry grain to destinations beyond its lines. It admits that frequently the loading of the cars at country stations was comparatively light, and that the economical movement of the cars east of the Missouri River required heavier loading than could ordinarily be obtained at the place of origin on the initial road.

It admits that it was essential to the Union Pacific Railroad to provide for the transfer of grain to cars other than its own at its termini at the Missouri River, such provision being necessary to secure the prompt release of its equipment to enable it to control the use of its cars and better satisfy the demands of shippers on its lines. It admits that in order to obtain the transfer of the grain at the Missouri River as aforesaid, and to obtain the quick release of its cars and use of the same, it in good faith entered into the contract with Frank H. Peavey of date February 7, 1899, duly pleaded and set forth in paragraph three (3) of the bill. It admits that pursuant to this contract and upon the faith of the same an elevator was built at a cost which it does not know, but believes to be approximately as pleaded by complainant; that this elevator was completed in the summer of 1899 and has been in operation since that time. It admits that a
61 similar arrangement was made with said Peavey at Kansas City, Missouri, and that an elevator was erected there as by complainants pleaded.

It admits that the rights of Peavey and Company were with its knowledge and consent assigned to the Omaha Elevator Company and the Midland Elevator Company.

It admits that the elevation and transfer of the grain have been essential to defendant for the proper handling of its grain. It neither admits or denies as to whether one and one-quarter cents (1¼c) or three-quarters of a cent (¾c) per one hundred pounds is at this time a reasonable value for the service performed, outside of contract stipulation, but as to this leaves complainants to their proof.

IV.

It admits that said contracts with the Union Pacific Railroad were long, generally, and publicly known, and that the Commission of its own motion made inquiry of the company thereto in July, 1902. It admits that the Commission, on May 7, 1903, made an order of inquiry into the validity of the contracts and had a hearing thereon; that the railways and elevator companies appeared before the Commission and contended that the Commission should not make an order or enter an inquiry because the elevation and transfer service were but an incident to, as distinguished from interstate commerce itself; but that the Commission did pursue the inquiry and did make the findings as stated in paragraph four (4) of complainant's bill, and did make the order marked "Exhibit 1" to complainant's bill.

V.

This defendant admits that the Commission made the reports to Congress in the year 1905 as set forth in paragraph five (5) of complainants' bill, and that provisions were enacted by Congress as shown in said bill. This defendant neither admits or denies that this legislation was violative of the Constitution of the United
62 States. This defendant does say that it did at all times properly publish its schedules of rates and charges, therein separately stating the elevation and transfer charges.

VI.

This defendant admits that after the passage of the above mentioned act, in July, 1906, the Commission did reopen said case, and that another hearing was had, and further proofs adduced and additional oral and printed arguments presented. It admits that on April 9th, 1907, the Commission made the order pleaded in paragraph six (6) of complainants' bill and shown as "Exhibit 2" thereto, and reduced the allowance to three-quarters of a cent (¾c) per one hundred pounds. This defendant neither admits or denies that the one and one-quarter cents charge was not unreasonable and was not in excess of the actual cost, but on that leaves complainants to their proof. This defendant admits that after said order it published said allowance at three-quarters of a cent (¾c) per one hundred pounds and paid the same to complainants.

VII.

This defendant admits that on April 14, 1908, the Commission again reopened the case, and thereafter, on June 29, 1908, entered

the order requiring this defendant from and after ten days to cease and desist from paying any sum to complainants for services rendered by them in elevation and transfer of grain. It admits that the Commission did not find the amount paid to be unreasonable. It admits that said order was as set forth in complainants' bill, paragraph seven (7), marked "Exhibit 4."

VIII.

This defendant admits that concurrently with the order aforesaid the Commission entered another order requiring competing carriers of this defendant to abstain from paying allowances for such services after October 1, 1908, and extended the time in which such payment might be made to December 1, 1908.

IX.

63 This defendant admits that when the order of June 29, 1908, was entered complainants demanded of the Union Pacific Railroad Company that it carry out and comply with its contract, and bring suit to set aside and annul the order of the Commission, and that this defendant declined to bring such suit and declined to make payment of such amounts without the order of the Commission; but that finally, with the consent of the Commission, it agreed to amend and publish its tariff schedules so as to provide for a continuance of said payments, but not to make any payment unless and until the court should determine there was liability. The Commission consented to the filing of this amendment, and this defendant has since said time carried this amendment in its tariffs.

X.

This defendant admits that said elevator companies prior to and since June 29, 1908, have performed elevation services for this defendant, as pleaded in paragraph ten (10) of complainants' bill, and rendered itemized accounts thereto as shown in "Exhibit 6" and "Exhibit 7" of complainants' bill. This defendant admits that demand was made for payment of these amounts, and that owing to the orders of the Commission this defendant has declined to pay for the services rendered prior to June 29, 1908, and also for such services rendered subsequent to that time.

XI.

Wherefore, having thus made full answer to all matters and things contained in the bill, this defendant prays to be dismissed with its cost in this behalf incurred; and further prays that if said order of the Commission be found just and valid, and said contract illegal, it be cancelled.

N. H. LOOMIS,
EDSON RICH,
Solicitors for Defendant Union Pacific Railroad Company.
F. C. DILLARD,
Of Counsel.

November 12, 1908.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

F. H. PEAVEY & COMPANY, OMAHA Elevator Company, and Midland Elevator Company, complainants,

v.

UNION PACIFIC RAILROAD COMPANY and Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, members composing the Interstate Commerce Commission, defendants.

In equity. No. 3405.

THE ANSWER OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

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I.

This defendant admits the allegations contained in paragraph 1 of the bill.

II.

Answering paragraph 2 of the bill:

Defendant admits that in 1899 Frank H. Peavey was and had been for years prior thereto a large dealer in grain, operating in the territory traversed by the Union Pacific, buying the grain at the points of production and forwarding it to the eastern and foreign markets. Admits that he was the senior member of the firm of F. H. Peavey & Co.; that he died in 1901; that his estate and legal representatives continued the business under the same name, organizing the Omaha and Midland companies, and at all times owning a majority of the stock of each. Admits that each of these companies is a large and extensive buyer of grain along the line of the Union Pacific and that they own a large number of elevators in the country, but defendant does not know whether or not upon the faith of the contracts mentioned in the next succeeding paragraph, and for the purpose of carrying the same out, said companies invested several hundred thousand dollars. Defendant admits that in dealing with the matters hereinafter mentioned and making the orders of which complaint is made defendant treated F. H. Peavey & Co. as the virtual owners of the business of the Omaha and Mid-

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land companies because they owned a majority of the stock and conducted the business of those companies in connection with and incident to their own business, and that upon this theory the orders hereinafter mentioned were made.

III.

Answering paragraph 3 of the bill:

Defendant admits that the Union Pacific and its predecessors in title have for years, and during the period herein mentioned, operated and that it still operates an extensive system of railways in the States of Nebraska, Kansas, Colorado, Wyoming, and Utah, one of the main lines extending from Council Bluffs, Iowa, to Ogden, Utah, and another one from Kansas City, Mo., to Denver, Colo. Defendant disclaims information sufficient to form a belief as to whether or not these lines traverse the greatest grain-producing territory of the United States, but admits that said lines traverse a very important and extensive grain-producing territory of the United States. Defendant admits that the Union Pacific system of railways is operated exclusively west of Council Bluffs and Kansas City, which are known as Missouri River points, because located upon that river, but defendant denies that the Union Pacific has no rails leading to any of the markets of the United States. On the contrary, defendant alleges that Council Bluffs and Kansas City are large and important grain mar-

kets. Defendant admits that the Union Pacific is the only large system whose lines of railway are located entirely west of the Missouri River, and that its competitors are composed of great railway systems whose lines extend from the same territory past the Missouri River and to the markets at and east and south of the Mississippi River and the Great Lakes, and other large systems of railways extending east from the Missouri River who have no tracks west thereof. Defendant admits that the States of Nebraska and Kansas constitute a large and very important portion of the grain territory of the United States, but disclaims information sufficient to form a belief as to whether or not they constitute the heart of the grain production of the United States. Defendant admits that a large portion of the grain produced in Nebraska and Kansas is tributary to and has for a great many years been carried by the Union Pacific on its way to eastern and foreign markets. Defendant admits that if this grain is carried to destination in the Union Pacific cars in which it is originally loaded the transportation must be completed by connecting lines which are not operated by the Union Pacific, but disclaims information sufficient to form a belief as to whether or not the Union Pacific has any control over said connecting lines, or any of them. Defendant admits that as the principal markets of consumption are in the Eastern States and foreign markets, the grain must

be carried long distances to reach destinations or the ports of transshipment abroad, and that if the Union Pacific cars are allowed to go to such points of consumption they are absent from the lines of the Union Pacific considerable periods of time and that the interval before they are returned is a matter of uncertainty. Defendant admits that when the Union Pacific permits its cars to go to said points of consumption it must relinquish the possession of the cars at the Missouri River and can get them back again only after prolonged and indefinite absence, and that in the meantime the Union Pacific is deprived of the use of such cars and can not know definitely when they will again be available for its own shippers. Defendant admits that for the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight, admits that the movement is not constant and regular throughout the year, but is largely confined to comparatively short seasons; that is to say, a few months of each year, depending more or less on the size of the crop and the range of obtainable prices. Defendant admits that during the grain-shipping season there is a pressing demand ordinarily for cars, particularly when market conditions tend to stimulate sales, and that it is a matter of common knowledge that for several years previous to October, 1907, business conditions were exceptionally prosperous; that the production of grain increased, and that

traffic of all kinds was offered to carriers for transportation, generally speaking, in unprecedented volume; that the Union Pacific, in common with other carriers, made large additions to its car and locomotive equipment, but was at times unable to meet the requirements of its shippers, because the growth of its traffic exceeded the increase of its transportation facilities. Defendant admits that under these circumstances it was desirable for the Union Pacific to keep its cars on its own lines of railway and under its own control to the extent it conveniently could. In this connection, however, defendant alleges that the condition of the Union Pacific was, during the years aforesaid, similar to that of other large railway systems, and that, generally speaking, since October, 1907, all carriers have had at all times sufficient cars and other equipment to accommodate the business of their patrons. Defendant admits that in February, 1899, and previous to that date, many cars owned by the Union Pacific were of low capacity, and that for this reason and because of other conditions at the points of origin the loading of cars with grain and other products was comparatively light, but alleges that in this regard the condition of the Union Pacific was similar to that of other carriers. Defendant admits that the economical movement of grain for the long distance it is carried east of the Missouri River renders it advisable to load the cars heavily, but denies that such loading can not be secured

at local stations on initial roads, and disclaims information sufficient to form a belief as to whether or not in actual practice the general loading of grain cars on the line of the Union Pacific fell generally below the loading needful to the cheapest hauling of grain to remote destinations, or whether or not it became essential to the Union Pacific to provide for the transfer of the grain to cars other than its own at its termini at the said Missouri River points. Defendant admits that previous to February 7, 1899, it was desirable for the Union Pacific to secure the prompt release of its equipment in order to retain the control and use of its cars and better satisfy the demands of its shippers, and that such release could be secured either by arranging for the transfer by the employees of the Union Pacific and the use of that carrier's appliances or by contract with others to perform the necessary services. Defendant admits that the latter course was adopted and that an agreement was entered into on February 7, 1899, by and between the Union Pacific and Frank H. Peavey, but disclaims information sufficient to form a belief as to whether or not said agreement was so entered into at the request of the Union Pacific in good faith and for a valuable consideration. Defendant admits that by the terms of said contract the Union Pacific agreed to convey to said Peavey a certain tract of land in Council Bluffs containing about 90,000 square feet and any additional land adjoin-

ing the same that might be required to enlarge an elevator building which said Peavey was to construct; to provide yard room and maintain a system of side tracks and switches in connection with such elevator according to plans shown on a map attached to and made a part of the contract; to deliver to said elevator all grain originating on the Union Pacific lines and transported thereover which might be consigned to or in care of said elevator and to pay said Peavey on all such grain transferred through said elevator a transfer charge not exceeding 1¼ cents per 100 pounds during the first ten years of the contract and not exceeding 1 cent per 100 pounds thereafter, but at no time more than the transfer charge customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by the Union Pacific at Omaha or Council Bluffs and to switch free of charge all cars loaded or empty to and from said elevator between points on the road of the Union Pacific within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading, or transfer of grain at said elevator as cheaply as the Union Pacific should contemporaneously handle cars for loading, unloading, or transfer at any other elevator at Omaha or Council Bluffs and not exceeding such aggregate sum in any one year as should equal 5 per cent on its in-

vestment as described in the contract, the total cost to be apportioned between the several lines on a wheelage basis and to permit other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, but defendant disclaims information sufficient to form a belief as to whether or not said terms are fair or reasonable. Defendant admits that said Peavey on his part agreed to erect on said premises and have ready for operation by June 1, 1899, a first-class elevator equipped with modern appliances of the capacity of about 1,500,000 bushels and thereafter to maintain the same in like condition; to receive from the railroad company any grain originating on the Union Pacific lines consigned to or in care of said elevator to the capacity thereof and to transfer promptly such grain from the Union Pacific cars through said elevator, the grain tendered by the Union Pacific to be first transferred and its cars promptly released; and to receive and safely store in said elevator for forty-eight hours free of charge any grain originating on the Union Pacific lines and delivered from the Union Pacific tracks at said elevator for storage or transfer. Defendant disclaims information sufficient to form a belief as to whether or not pursuant to said contract and upon the faith thereof an elevator was built at the cost of about $200,000, but admits that subsequent to the execution of said contract such an elevator

was in fact erected and that same was completed in the summer of 1899 and has been in operation since that time. Defendant admits that while the elevator was in course of construction at Council Bluffs, or soon thereafter, said Peavey assigned his interest in the contract with the consent of the Union Pacific to the Omaha company, which, being organized for the purpose, acquired the elevator plant and business and has since owned and conducted the same, but disclaims information sufficient to form a belief as to whether or not said Omaha company has at all times since carried out the provisions of said contract. Defendant admits that practically all the capital stock of said Omaha company has at all times been and still is owned by said F. H. Peavey & Company. Defendant admits that an arrangement was made by and between the Union Pacific and the Midland company at Kansas City similar to the arrangement aforesaid between the Union Pacific and said Peavey, and that there was erected by the Midland company, organized for the purpose, an elevator of 1,000,000 bushels' capacity at very large cost, but disclaims information sufficient to form a belief as to whether or not these agreements were made in good faith and have since been carried out in good faith in conformity to their terms and to the mutual satisfaction of the parties with the single exception of a reduction in the elevator allowance paid by the Union Pacific. Defendant admits that a large

portion of the grain shipped over the Union Pacific is bought by and shipped to said Omaha company and said Midland company at their respective elevators where it is transferred and reshipped to eastern and foreign markets, but disclaims information sufficient to form a belief as to whether or not the amount which passed through the elevator of the Omaha company at Omaha has averaged annually over 6,000,000 bushels, or whether or not the amount which has passed through the elevator of the Midland company at Kansas City has averaged annually in excess of 2,500,000 bushels, or whether or not said Omaha company and said Midland company have on the tracks of the Union Pacific 46.6 per cent of the facilities for handling all of the grain business thereof or whether or not said Omaha company and said Midland company have been able to secure only 38.5 per cent of said grain business. Defendant admits that the transfer at Council Bluffs and Kansas City of said grain from the cars of the Union Pacific to cars of other railways over which grain is carried east therefrom is in some cases an advantage to the Union Pacific, but denies that such transfer is absolutely essential, and denies that 1¼ cents per 100 pounds is a reasonable and just charge therefor or less than the actual cost of the service, admits that up to the time of the taking effect of defendant's order dated April 9, 1907, the Union Pacific paid for such service 1¼ cents per 100 pounds, and admits that thereafter

and until the taking effect of defendant's order of June 29, 1908, the Union Pacific paid for such service three-fourths of a cent per 100 pounds.

IV.

Answering paragraph 4 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not said contracts with the Union Pacific had been long generally and publicly known prior to July, 1902, but admits that at that time defendant of its own motion made written inquiry of the Peavey company in reference to said Peavey contract and then had disclosed to it the terms of same, but issued no order in connection with said contract at that time. Defendant admits that on May 7, 1903, defendant, pursuant to complaint filed in its office by one or more carriers in competition with the Union Pacific, made an order of inquiry recorded as upon its own motion into the validity of and practice under said contract; that the Union Pacific, the Omaha company, and the Midland company each appeared, and among other things contended that defendant should not make any order or enter into any inquiry because elevation and transfer services were but an incident to as distinguished from interstate commerce, that the case was vigorously prosecuted by counsel of such competing carriers, and that after full investigation and the taking of much evidence, the hearing of oral argument, and the receipt of printed argu-

ments, did on June 25, 1904, render an opinion, make a finding, and enter an order, copies of which are attached to complainants' bill as Exhibit 1 and made a part thereof, but denies that said finding declared to be true the facts set forth in paragraph 3 of complainants' bill, and also in addition thereto the facts stated in subdivisions A, B, C, and D of paragraph 4 of complainants' bill, although defendant admits that many of the facts stated by complainants in paragraphs 3 and 4 of their bill are included also in said Exhibit 1. In this connection, therefore, defendant refers the court to the language of said Exhibit 1.

V.

Answering paragraph 5 of the bill:

Defendant admits that in its report to Congress in 1905 it made recommendations concerning amendments to the act to regulate commerce as stated by complainants, but denies that it caused its members to appear before the congressional committee to urge an amendment to the law so that it might be changed in accordance with such recommendations, although defendant admits that pursuant to invitation of said committee defendant's members appeared and testified before said committee in connection with proposed amendments to said law, and that by an act approved on June 29, 1906, said act to regulate commerce was amended as stated by complainants in subdivisions A, B, and C of said paragraph 5.

Answering the last subdivision of said paragraph 5, defendant denies that in the light of previous history of litigation it was the intention of Congress to make said amendments applicable to the aforesaid contracts and permit complainants to furnish the aforesaid services and to be paid the reasonable value thereof; denies that this was all the defendant had asked or that said amendments came solely in response to defendant's request, or that said legislation was violative of the Constitution in that section 8, Article I, only permits Congress to regulate commerce and does not permit it to deal with mere incidents thereto, such as elevation and transfer charges, and, as applied to complainants, impairs the obligation of contracts depriving complainants of their property without process of law or taking their property for public use without compensation contrary to the fifth amendment of the Constitution of the United States. Defendant admits that the Union Pacific at all times since said June 25, 1904, has published, as provided by statute, its schedule of rates and charges, stating separately therein the elevation and transfer charges paid by said Union Pacific as aforesaid.

VI.

Answering paragraph 6 of the bill:

Defendant admits that after the passage of the amendatory act aforesaid and in July, 1906, pursuant to complaints received by it from interested

parties, including carriers competing with the Union Pacific, defendant ordered said case reopened for further evidence and argument, and that after due notice to the interested parties, including complainants, a second hearing was had, further proofs adduced, and additional oral and printed arguments submitted. Defendant admits that on April 9, 1907, defendant made a finding and entered an order as shown by complainants' Exhibit 2 to their bill of complaint, but denies that said order was made against the complainants. On the contrary, defendant alleges that said order was made only against said Union Pacific Railroad Company. Defendant denies that in said Exhibit 2 defendant stated that under the law as amended it was the duty of a carrier to furnish transfer and elevation services or that the carrier might lawfully pay the shipper for the performance of such service, but defendant admits that in said Exhibit 2 defendant stated that the allowance of 1¼ cents per 100 pounds was in excess of the actual cost of said service and should be treated as unlawful to the extent of such excess, and also admits that defendant required by its said order of April 9, 1907, that the Union Pacific should reduce said allowance to three-fourths of a cent per 100 pounds. In this connection, defendant alleges that the language used by defendant in said Exhibit 2 was: "The statute itself has also been amended so as to include transfer in transit, storage, and

elevation among the facilities of transportation which interstate carriers must or may provide for their shippers (section 1)." (Complainants' Exhibit 2, p. 3.) Defendant denies that in said Exhibit 2 there was no finding that 1¼ cents was unreasonable, but admits that defendant there stated that under the act as amended no allowance could be made in excess of the actual cost of said service. In this connection defendant calls attention to the language used by defendant as shown by said Exhibit 2, which is as follows: "Granting, then, that the allowances were not shown to be excessive on the prior investigation, do they now appear to be unreasonable in the light of the facts and circumstances disclosed upon rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction." (Complainants' Exhibit 2, pp. 6 and 7.) Defendant denies that the allowance of 1¼ cents was not unreasonable or not in excess of the actual cost of said service or was less than it would have cost the Union Pacific to render the service. On the contrary, defendant alleges that said charge of 1¼ cents was and is unreasonable and much in excess of the cost of said service. Defendant denies that the finding and order made by defendant in this connection were based upon a statute which was unconstitutional for reasons stated in their bill by complainants, or that defendant's action in the premises was an improper ap-

plication of the law because under the statute the person performing said services is not limited as to the compensation therefor to the actual cost of doing the work, but disclaims information sufficient to form a belief as to whether or not the determination of the Union Pacific to abide by defendant's decision and the refusal of the Union Pacific to longer publish the 1¼-cent rate in its schedule, or the great difficulty in readjusting and rearranging business and difficulty in finding a remedy, required complainants to receive after said April 9, 1907, payment at the rate of three-fourths of a cent per 100 pounds for such services.

VII.

Answering paragraph 7 of the bill:

Defendant admits that on April 14, 1908, defendant entered an order, as shown by complainants' Exhibit 3, reopening the case and setting it down for further argument on May 8, 1908, and that at the latter date, without any additional testimony being offered or permitted, the case was again argued. Defendant admits that on June 29, 1908, defendant entered an order, as shown by complainants' Exhibit 4, requiring the Union Pacific to cease and desist from "paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs (or on grain so received in any of said elevators in which they have any direct or

indirect ownership or interest) that is not reshipped out of said elevators within ten days after it has been received therein, and to cease and desist from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs," but denies that said order was entered upon the mistaken ground that under the law the Omaha and Midland companies, being shippers, could not receive payment for said services, and defendant denies that no finding was made that the sum paid for said service was unreasonable. On the contrary, defendant alleges that said Exhibit 4 clearly shows that the action of the Union Pacific in paying said allowances was, under all the facts and circumstances, unreasonable and unduly discriminatory. Defendant admits that defendant has at all times treated the payments to the Omaha company and the Midland company as equivalent to payments made direct to Peavey & Company, but denies that defendant made its last order against Peavey & Company only because the stock of the Omaha and Midland companies was owned by said Peavey & Company and because the Omaha company and the Midland company were found to have been formed and used for the purpose of facilitating the business of Peavey & Company. On the contrary, defendant

alleges that defendant did not make said order or any order against Peavey & Company, and that said order, as will appear from an examination thereof, is made only against the Union Pacific Railroad Company, but defendant admits that it intends to, and will, unless restrained from doing so, enforce compliance with the terms of said order.

VIII.

Answering paragraph 8 of the bill:

Defendant admits that, by order dated June 29, 1908, defendant made a finding and entered an order in another case to which complainants' Exhibit 5 relates, neither the complainants nor the Union Pacific being a party to said case, against rival and competing carriers of the Union Pacific operating to some extent in the same territory requiring them to "abstain from giving or paying three-fourths of a cent per 100 pounds or any other sum as an allowance or compensation for services rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines or points or places in territory adjacent thereto," after October 1, 1908, and also admits that thereafter the effective date of said order was postponed to December 1, 1908, but denies that under the order of defendant the Union Pacific could not pay complainants for such service after June 29, 1908, or that every other rival and competing carrier could pay for such services at Missouri River points at least up to December 1,

1908, and at all other points in the country so pay at all times, or that thereby an undue and unjust discrimination was practiced, sufficient in and of itself to render null and void said order of June 29, 1908. In this connection defendant alleges that said order of June 29, 1908, requiring the Union Pacific to cease and desist from paying an allowance to Peavey & Company applies only where Peavey & Company own or have a direct or indirect interest in the grain, if said grain is not reshipped out of the elevators within ten days after it has been received therein, and where Peavey & Company own or have a direct or indirect interest in the grain if the grain is mixed, treated, weighed or inspected in any of the elevators of Peavey & Company at Kansas City or Council Bluffs; and defendant further alleges that said order of June 29, 1908, requiring, as aforesaid, carriers other than the Union Pacific to abstain from paying an elevator allowance does not permit said carriers or any of them to pay said allowances at Missouri River points up to December 1, 1908, or for any period of time or to pay said allowances at all times or at any time at points in the country.

IX.

Answering paragraph 9 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not when said order of June 29, 1908, was entered against the Union Pacific, complainants demanded of the Union Pacific

that it carry out and comply with its contract and bring a suit to annul and set aside the order of defendant, or whether or not the Union Pacific declined to comply with complainants' request and finally agreed with the consent of defendant to amend its published tariff and schedule so far as to provide for a continuance of said allowance, but to prohibit any payment being made thereunder unless and until a court should determine there was a liability; but defendant admits that such an amendment was made in said published tariffs and schedule and that defendant consented to the filing of such amendment with the understanding that it should have an opportunity to be heard in any proceeding to question defendant's aforesaid order of June 29, 1908, against the Union Pacific, and defendant admits that such opportunity has been afforded by making defendant's members parties to this suit.

X.

Answering paragraph 10 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not since the 1st of May, 1908, and since the promulgation and taking effect of the order aforesaid of June 29, 1908, and up to the 1st day of October, 1908, the Omaha and Midland companies have performed for the Union Pacific the elevation and transfer services aforesaid to the extent and in the amount set forth in the itemized accounts attached to complainants'

bill and marked " Exhibit 6 " and " Exhibit 7," or whether or not the services will continue to be rendered and bills therefor will constantly accrue. Defendant denies that a charge of 1¼ cents per 100 pounds for said services is reasonable or that complainants are entitled under and by virtue of said contracts to make such charge. Defendant disclaims information sufficient to form a belief as to whether or not demand has been made upon the Union Pacific for the sums due for services or whether or not the Union Pacific refused to pay for such services rendered since June 29, 1908, or to pay for such services rendered prior to that date, upon the pretended ground that defendant's order of that date operates retroactively. Defendant denies that defendant's order of April 9, 1907, is erroneous in that it was not supported by the evidence and was contrary to law or in that the person rendering the service was entitled to his reasonable, not the mere, cost of the service and denies that 1¼ cents was or is a reasonable charge for such service. Defendant also denies that defendant's order of June 29, 1908, against the Union Pacific Railroad Company was or is contrary to the law and to the evidence or was or is a total misconception of the statute because it holds that a shipper can not render said service and be paid therefor. On the contrary defendant alleges that said order was when made as aforesaid on said June 29, ever since has been, and now is proper, just, and lawful.

Defendant further alleges that said order of June 29, 1908, issued against the Union Pacific Railroad Company as aforesaid was made and entered by defendant under facts, circumstances, and conditions which are as follows:

On June 25, 1904, after investigation had pursuant to complaint made by interested common carriers charging that the payment of 1¼ cents per 100 pounds by the Union Pacific to Peavey & Company, or corporations owned and controlled by that firm, under said contract of February 7, 1899, for the transfer of grain through elevators of the latter at Council Bluffs and Kansas City, gave to Peavey & Company, who were dealers in and shippers of grain, undue preference and advantage, and subjected other shippers to undue prejudice and disadvantage, defendant dismissed said complaint.

As a result of said investigation, defendant found that no shipper had made complaint in the premises; that the good faith of the Union Pacific in entering into said contract had not been impeached; that it was a benefit to the Union Pacific to have the grain transferred from its cars to the cars of its connections at Council Bluffs and Kansas City, because the Union Pacific was thereby enabled to retain and use its cars on its own lines of railway to a greater extent than it could do otherwise; that the probable effect of said payment was to secure to said Peavey & Company important advantages over their competitors, and that said payment was

more than sufficient to pay all the expense of operating said elevators, including taxes and insurance on and maintenance and repairs of the buildings, but not more than a reasonable compensation for the transfer services performed.

And defendant held that the Union Pacific had a right to perform said transfer services itself by its own agencies and employees or hire a shipper to do so; that such right was not affected by the fact that a shipper so hired would thus secure important advantages over his competitors, unless the payments made were more than reasonable compensation for the service performed, and that under the circumstances disclosed by the record the payments made as aforesaid under said contract of the Union Pacific did not constitute a violation of the act to regulate commerce.

On February 19, 1906, the Supreme Court of the United States, in a decision rendered by it in the case of *New York, New Haven & Hartford Railroad Co.* v. *Interstate Commerce Commission,* 200 U. S., 361, held that "The interstate commerce act was enacted to secure equality of rate and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all-embracing and applicable to every method by which the forbidden results could be brought about." (Syllabus.)

In that case the Supreme Court declared void, because in conflict with the provisions of the act to regulate commerce, a contract entered into by and between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, and said that such a contract, although legal when made, became void as soon as compliance with its terms involved the doing of something prohibited by said act. (Ibid., 398.)

Subsequent to said June 25, 1904, carriers other than the Union Pacific who furnished transportation facilities at points on the Missouri River and who, so far as rates of transportation were concerned, had previously placed Atchison, Kans., on a parity with Kansas City, Mo., and Kansas City, Argentine, and Leavenworth, Kans., established and put in force at the four latter points regulations whereby free elevation or an elevator allowance was accorded by them on interstate shipments of grain transferred through elevators located at said four latter points, but refused to accord a like free service or allowance at Atchison, Kans., on interstate shipments of grain transferred through elevators at that point. This discrimination was by defendant held to be a violation of the act to regulate commerce, and an order issued by defendant requiring said carriers to discontinue the discrimination was obeyed by the latter. (12 I. C. C. Rep., 111.)

For a time after said June 25, 1904, the Union Pacific confined the payment of said transfer or ele-

vator allowance to shipments of grain transferred at Council Bluffs and Kansas City through the elevators operated as aforesaid by the Omaha Elevator Company and the Midland Elevator Company, but afterwards extended them to shipments of grain transferred through an elevator at Council Bluffs operated by the Trans-Mississippi Grain Company, and later and previous to April 9, 1907, extended them also to grain shipments transferred through other elevators at said points, except that it did not pay the transfer charge or elevator allowance on grain shipped over its lines of railway from points of origin in Kansas and Nebraska to points on the Missouri River, including Council Bluffs and Kansas City, in cases where the grain was put into elevators at the latter points, but on account of being ground into products or for some other reason was not reshipped over transportation lines from the river to points east thereof.

The transfer charge or elevator allowance of 1¼ cents per 100 pounds paid by the Union Pacific as aforesaid at Council Bluffs and Kansas City gave to grain dealers who purchased grain at points on lines of railway of the Union Pacific an advantage over other grain dealers who purchased their grain at points on other lines of railway in Kansas and Nebraska, and to offset this advantage carriers other than the Union Pacific established and put in force at the Missouri River regulations whereby they accorded to interstate shipments of grain

originating at said other points where transferred through elevators at the river and afterwards reshipped to points east thereof a similar allowance.

But while the Union Pacific and other carriers thus established and paid elevator allowances at points on the Missouri River, such allowances were not established or paid by them or other carriers where interstate shipments of grain were transferred through elevators at other points. This caused great dissatisfaction, and much complaint was made by parties engaged in the purchase, shipment, and sale of grain transferred through elevators at the latter points. As a consequence and pursuant to application made by certain carriers, defendant reopened said case in July, 1906, and after due notice to the interested parties made a second investigation in the premises.

Meanwhile, by a law approved on June 29, 1906, the act to regulate commerce had been amended so as to include, in the term transportation, storage, elevation, and transfer in transit, and so as to authorize defendant to determine and fix by appropriate order the reasonable maximum charge to be paid by a carrier to the owner of property transported under the act for any instrumentality furnished or any service directly or indirectly rendered in connection with the transportation of said property by such owner.

As a result of said second investigation, defendant found that the transfer or elevator allowance of

1¼ cents per 100 pounds paid by the Union Pacific on interstate shipments of grain transferred through elevators located at points on the Missouri River, as aforesaid, exceeded the cost of said transfer to the extent of one-half of a cent per 100 pounds, and to the extent of such excess operated as a rebate and gave to the owners of the grain an advantage over their competitors; held that said transfer or elevator allowance was unlawful to the extent it exceeded such cost, and by order dated April 9, 1907, a copy of which is included in complainants' Exhibit 2, required the Union Pacific to cease and desist from paying for such transfer or elevator services more than three-fourths of a cent per 100 pounds of the grain transferred.

Defendant further held that if elevation were furnished by the Union Pacific for the grain of one shipper over its lines without proper arrangements being made to furnish elevation to other shippers over such lines, unjust and unlawful discrimination would result, and that the aforesaid amendment to the act to regulate commerce providing that "if the owner of property, transported under this act, directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers

for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section," must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. (Complainants' Exhibit 2, p. 7.)

Said order of April 9, 1907, was complied with by the Union Pacific and a corresponding change was made by other carriers in the transfer or elevator allowance paid by them at points located on the Missouri River. But thereafter the Union Pacific confined the transfer or elevator allowance paid by it to grain transferred through elevators located at the termini of the Union Pacific on the Missouri River, and said other carriers confined the transfer or elevator allowance made or paid by them almost entirely to grain transferred through elevators located at points on said river, although during all the times hereinbefore mentioned and since said April 9, 1907, there have been and now are a large number of elevators located on the lines of each of said carriers at points of origin and milling points in Kansas and Nebraska west of the Missouri River, and at points in other States, and

used by grain dealers in connection with the interstate transportation of grain over said lines, and during all said times there have been and now are many grain dealers engaged in the interstate transportation of grain from said points of origin over said lines who did not and do not wish to use any of said elevators in connection with such transportation.

The circumstances described in the last preceding paragraph and the discriminations which resulted therefrom so injuriously affected the parties and places discriminated against that numerous protests and complaints were forwarded to defendant subsequent to said April 9, 1907, by parties against whom the discriminations operated, and as a consequence defendant, on April 14, 1908, reopened said case for further consideration and, giving due notice to interested parties, assigned it for further argument at Washington, D. C., on May 8, 1908, as shown by complainants' Exhibit 3.

After listening to such further argument and considering same in the light of defendant's experience concerning transfer or elevator allowances paid by carriers on, and free transfer by carriers of, grain transferred through elevators at different points, and after a reexamination and careful reconsideration of the record in said case, defendant concluded that, in connection with the interstate transportation of grain, any such payment of a transfer or elevator allowance or any such free

transfer made under such circumstances, that the owner of the grain, or any party interested therein, was enabled to and did, while the tansfer was being made, either by himself or some one acting in his behalf, inspect, clip, clean, mix or otherwise treat the grain, constituted an unjust discrimination, gave to such owner or interested party undue and unreasonable preference and advantage and subjected other parties who did not receive such transfer or elevator allowance or free transfer to undue and unreasonable prejudice and disadvantage, and in accordance with such conclusion, issued said order of June 29, 1908, a copy of which is included in complainants' Exhibit 4.

Defendant further alleges that during several years next previous to June 29, 1908, there were, ever since have been, and now are on the lines of railway of said Union Pacific Railroad Company at said points of origin and said milling points in Kansas and Nebraska, west of the Missouri River, and at milling points located on said river, about 400 elevators through which interstate shipments of grain have been during said times and now are transferred, and contemporaneously inspected, clipped, cleaned, mixed or otherwise treated by the owner thereof or some party interested therein either by himself or some one acting in his behalf; that said grain has been during said times and now is transported over the lines of railway of the Union Pacific, and that said Union Pacific has refused during said

times and still refuses to pay on said grain any transfer or elevator allowance, although during all said times previous to said June 29, the Union Pacific paid under said contract of February 7, 1899, and would now pay under said contract if not restrained from doing so, a transfer or elevator allowance on other interstate shipments of grain owned and shipped by said Peavey & Company, by said Omaha Elevator Company and by said Midland Elevator Company and transported over said lines of railway by the Union Pacific from said points of origin to points on the Missouri River including Council Bluffs and Kansas City and transferred at the latter points through elevators operated by said Omaha Elevator Company and said Midland Elevator Company and inspected, clipped, cleaned, mixed or otherwise treated by the latter two companies while being so transferred.

That while the Union Pacific was paying the transfer or elevator allowance on interstate shipments of grain owned and shipped by said Peavey & Company, by said Omaha Elevator Company and by said Midland Elevator Company, as stated in the last preceding paragraph, many other interstate shipments of grain, owned by other parties, were transported by the Union Pacific over its said lines of railway from said points of origin to said Missouri River points, but were not transferred through any elevator located on the lines of the Union Pacific or on the Missouri River, and that

the Union Pacific refused to pay to such other parties on their said interstate shipments any transfer or elevator allowance.

That as a practical matter the owners of grain transported from points of origin in Kansas and Nebraska to points of destination in other States must and always do cause the grain to be transferred through an elevator at some point and inspected, clipped, cleaned, mixed, or otherwise treated while being so transferred; that the value to such owners of having their grain so handled is on an average as great as the cost of such handling and ranges from one half of a cent per 100 pounds to 4 or 5 cents per 100 pounds, but that the cost of so handling grain is more at one point than at another point, and more at one time than at another time at the same point. That the charge exacted in each instance by the Union Pacific for transporting said interstate shipments of grain from said points of origin in Kansas and Nebraska over its lines of railway to Missouri River points, including Council Bluffs and Kansas City, was, during all said times previous to June 29, 1908, its full published rate applicable to such transportation, and that therefore, where, as aforesaid, it paid transfer or elevator allowances to Peavey & Company, to the Omaha Elevator Company, or to the Midland Elevator Company, under said contract of February 7, 1899, such payments operated as a departure by the Union Pacific from its published rate and con-

stituted a violation of section 2 of the act to regulate commerce in that the Union Pacific, by reason of the premises, charged, demanded, collected, and received from one person or party for a service rendered in the transportation of grain, a greater compensation than it contemporaneously exacted from another person or party for the transportation of a like kind of traffic under substantially similar circumstances and conditions, and also constituted a violation of section 3 of said act in that by reason of the premises the Union Pacific gave to certain parties and localities undue and unreasonable preference and advantage and subjected other parties and other localities to undue and unreasonable prejudice and disadvantage.

Defendant further avers that said Peavey & Company and the elevator companies, claiming through Peavey & Company the benefit of said contract as aforesaid, are grain dealers at Omaha and Council Bluffs and other points upon the Missouri River and also in other localities in different parts of the United States; that in the prosecution of the business of a grain dealer it is absolutely essential to use elevation facilities by which grain can receive an official weight, an official inspection, and be stored, cleaned, clipped, mixed, and otherwise treated before being sold for particular purposes.

Defendant further avers that substantially all the grain taken into the elevators of said Omaha and Midland Companies upon which an elevator al-

lowance is paid belongs to Peavey & Company; that the service performed by Peavey & Company, and said Omaha and Midland companies, while termed upon the tariffs a transfer and while paid for in said contract under the guise of a transfer is, in point of fact, elevation which they would have to perform in precisely the same way and to precisely the same extent if they had no contract with the Union Pacific Company; that the practical working out of this contract results in a payment to Peavey & Company of 1¼ cents per 100 pounds upon all their grain which they handle through their elevators, although handled in precisely the same way that they would have to handle it without any compensation from the railroad company but for the existence of said contract.

Defendant further avers that 1¼ cents per 100 pounds is a large profit for handling grain and is so regarded by grain dealers and that oftentimes the profit derived from such handling does not exceed one-eighth of a cent per bushel; that therefore if the Union Pacific can, under the guise of said contract, pay Peavey & Company the sum of 1¼ cents per 100 pounds for the transaction of their own business while the competitors of Peavey & Company receive no such allowance, there arises in favor of Peavey & Company an unjust discrimination which, if such payment could be confined to them, would give them a monopoly of the grain business; that if every railroad entering said

Council Bluffs, or Omaha, Nebraska, were to make a similar contract with Peavey & Company and pay them such an allowance while a similar allowance was paid to no other grain dealers at those points, there could be in that locality no elevators other than those owned and operated by Peavey & Company; that the unlawful discrimination under said contract of February 7, 1899, arises out of the fact that the service rendered by Peavey & Company is not a transfer for the Union Pacific—is not an incident to the transportation of their grain, although it may result in a physical transfer from car to car, but is elevation which must be performed by Peavey & Company in the prosecution of its business and for which, under the operation of said contract, the Union Pacific Company pays Peavey & Company.

Defendant further alleges that when interstate shipments of grain are hauled by the Union Pacific as aforesaid over its lines of railway from said points of origin in Kansas and Nebraska to said Missouri River points, including Council Bluffs and Kansas City, the rate for such transportation published, filed, exacted, and received by the Union Pacific is the same where the final destination of the grain is such points on the Missouri River as where such final destination is some point east of said river.

Defendant further alleges that so far as the Union Pacific Railroad Company is concerned the final destination of the shipments of grain mentioned in the last preceding paragraph is always

some point on the Missouri River, and that where said grain is afterwards reshipped from said river to some point east thereof it is so reshipped upon a bill of lading and contract for transportation independent of and different from the bill of lading and contract for transportation under which it is transported by the Union Pacific over its lines of railway from said points of origin to said Missouri River points, and that the latter transportation is in no way connected with the former transportation.

Defendant further alleges that on December 2, 1908, said order of June 29, 1908, against the Union Pacific Railroad Company, a copy of which is included in complainants' Exhibit 4, was by defendant so modified as to become effective on July 1, 1909, instead of forthwith as shown in said copy. A copy of said modifying order is attached hereto marked Exhibit 1 and hereby made a part of this answer.

Defendant further alleges that said order of June 29, 1908, against the Chicago, Burlington & Quincy Railroad Company and other common carriers, referred to in complainants' Exhibit 5, and by its terms made effective on October 1, 1908, but thereafter so modified as to become effective on December 1, 1908, and thereafter further so modified as to become effective on January 1, 1909, was on November 25, 1908, further so modified as to become effective on July 1, 1909, instead of on said January 1. Copies of the four orders mentioned

in this paragraph are hereto attached marked respectively Exhibit 2, Exhibit 3, Exhibit 4, and Exhibit 5, and hereby made a part of this answer.

Defendant further alleges that the modifying orders mentioned in the last two preceding paragraphs were made for the purpose of giving to common carriers throughout the country a reasonable opportunity to bring their tariffs and practices into conformity with defendant's conclusions and orders concerning transfers through elevators and transfer and elevator allowances, connected with the interstate transportation of grain, and that unless restrained from doing so by competent authority defendant will require and enforce such conformity on the part of said carriers.

All of which matters and things the said defendant is ready to aver, maintain, and prove as this honorable court shall direct; and thereby prays to be hence dismissed, with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,

By ——— ——— ———,
Secretary thereof, thereunto duly authorized.

ARBA S. VAN VALKENBURGH,
United States Attorney,
Kansas City, Mo.,

P. J. FARRELL,
1317 F Street NW.,
Washington, D. C.,
Solicitors for Interstate Commerce Commission.

WASHINGTON, *District of Columbia, ss:*

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, having read the foregoing answer and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

_____ _____,
Secretary of the
Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this the _____ day of December, 1908.

[L. S.] _____ _____,
Notary Public.

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EXHIBITS 1 TO 5, INCLUSIVE.

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EXHIBIT 1.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2d day of December, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
Commissioners.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Upon consideration of the record in the above-entitled case,

It is ordered, That an order heretofore entered in this case and by its terms made effective June 29, 1908, be, and it is hereby, so modified as to become effective July 1, 1909, instead of June 29, 1908.

It is further ordered, That a copy of this order be served upon each of the parties to said proceeding.

EXHIBIT 2.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 29th day of June, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

SAME

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

SAME

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full

investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, be, and they severally are, hereby notified and required to cease and desist, on or before the first day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying three-fourths of 1 cent per 100 pounds or any other sum as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines, or points or places in territory adjacent thereto. Tariffs withdrawing said allowance may be made effective upon thirty days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and numbers of these cases.

EXHIBIT 3.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of August, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record and the report in the above-entitled cases, and pursuant to application made for that purpose:

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It is ordered: That an order dated June 29, 1908, heretofore made by the Commission in the above cases, effective October 1, 1908, be, and the same is hereby, so modified that it shall be effective December 1, 1908, instead of on said October 1, 1908.

It is further ordered: That a copy of this order be served upon each of the parties to said proceedings.

EXHIBIT 4.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23d day of October, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record in the above-entitled cases,

It is ordered: That an order heretofore entered in these cases and by its terms made effective on October 1, 1908, but afterwards so modified as to become effective December 1, 1908, be, and it is hereby, so further modified as to become effective January 1, 1909, instead of December 1, 1908.

It is further ordered: That a copy of this order be served upon each of the parties to said proceedings.

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EXHIBIT 5.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of November, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record in the above-entitled cases,

It is ordered, That an order heretofore entered in these cases and by its terms made effective on October 1, 1908, but afterwards so modified as to become effective December 1, 1908, and again modified so as to become effective January 1, 1909, be, and it is hereby, so further modified as to become effective July 1, 1909, instead of January 1, 1909.

It is further ordered, That a copy of this order be served upon each of the parties to said proceeding.

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98 Afterwards, to wit, on the 11th day of November, 1909, the Cross-Bill of the Union Pacific Railroad Company was filed Said Cross-Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405.

F. H. PEAVEY AND COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, JUDSON C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Inter-State Commerce Commission, Defendants.

Cross-bill of Union Pacific Railroad Company, Defendant, to the Bill of F. H. Peavey and Company, Omaha Elevator Company, and Midland Elevator Company.

To the Honorable the Judges of the Court aforesaid:

And now coming, the above named defendant, Union Pacific Railroad Company, by the leave of this Honorable Court, first had and obtained, — files its cross-bill herein against the plaintiffs, and all and singular the said defendants as if their names had been fully here repeated, and represents to the Honorable Court, as follows:

1. That the complainant, F. H. Peavey and Company, is a corporation organized and existing under the laws of West Virginia, with its chief offices therein, and a citizen thereof; that the Omaha Elevator Company is a corporation organized under the laws of Nebraska, with its chief offices therein, and a citizen thereof; that the Midland Elevator Company is a corporation organized and existing under the laws of West Virginia, with its chief offices therein and a citizen thereof; that the Interstate Commerce Commission is and has since prior to January first, 1908, been composed of the following named individuals, each of whom is a citizen of the State mentioned immediately following his name: Martin A. Knapp of New York, Judson C. Clements of Georgia, Charles A. Prouty of Vermont, Francis M. Cockrell of Missouri, Franklin K. Lane of California, James S. Harlan of Illinois, and Edgar E. Clark of Iowa; that this defendant, the Union Pacific Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and a citizen thereof; that this is a suit arising
99 under the laws of the United States, and also wherein there is a controversy between citizens of different States, the matter and amount in dispute exceeding, exclusive of interest and costs, the value or sum of Two Thousand Dollars.

2. That this defendant filed its answer in this cause on the 16th day of November, 1908, and hereby adopts and repeats all the alle-

gations of the said answer so filed, and prays that the same may be taken and considered as a part of this defendant's cross-bill as fully as if herein incorporated and repeated.

3. Your cross-petitioner further shows to the Court that it owns and operates a line of railroad extending from Council Bluffs, Iowa, in part through the State of Iowa, then through Nebraska, Wyoming, and Utah, to Ogden, Utah, and also a line of road extending from Kansas City, Missouri, in part through the State of Missouri, then through Kansas and Colorado, by way of Denver, and Wyoming, where the said last named line unites and joins at Cheyenne, Wyoming, with the main line extending from Council Bluffs, Iowa, to Ogden, Utah.

4. Your cross-petitioner further shows that the States of Kansas and Nebraska produce large amounts of wheat, corn and other cereals, and that for convenience in handling, shipping and marketing the said products, private parties have built and now own and operate at almost every station on the lines of the Union Pacific Railroad, in both Kansas and Nebraska, elevators and storehouses.

5. Your cross-petitioner further shows, that so far as the lines of the Union Pacific Railroad are concerned the market movements of all the cereal products of Kansas and Nebraska are principally toward the East, there being large terminal and storage elevators at Kansas City, Missouri, Kansas City, Kansas, Council Bluffs, Iowa, and Omaha, Nebraska. That said elevators are located either upon the rails of the Union Pacific Railroad or upon lines of road in said cities having trackage connection with your cross-petitioner's various lines of road.

6. That prior to the 7th day of February, 1899, owing to the enormous increase of cereal products in the States of Kansas and Nebraska, and the inadequate equipment for the transportation of the same, then owned and controlled by the Union Pacific Railroad Company, and owing to the further fact that under the practice then obtaining with references to the handling of cars and equipment as between connecting carriers, and owing to the fact that the grain transported to Kansas City, Kansas, Kansas City, Missouri, Council Bluffs, Iowa, and Omaha, Nebraska, was largely destined to markets East and South of said points, and owing to the further fact that prior to the year 1899 there was no per diem contract or understanding in effect between carriers, and owing to the further fact that
100 unless such cars transporting grain were unloaded and made empty at the points above named, the same passed out of the possession of the Union Pacific, and the grain was carried thereon to destination, thus losing to the Union Pacific the use of said transportation facilities as well as the revenue that might otherwise have been derived therefrom. In view of this situation and condition, and for the purpose of relieving the same and permitting your cross-petitioner to retain at all times upon its own rails, its full and complete equipment, your cross-petitioner on the 7th day of February, 1899, entered into a written contract with Frank H. Peavy, a true copy of which said contract is hereto attached as "Exhibit A," and made a part of this cross-petition by way of reference.

7. Said contract provided among other things that the Railroad Company should convey to Peavey a certain tract of land in Council Bluffs, Iowa, containing about ninety thousand square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey was to construct under the terms of said agreement; to provide yard room and maintain a system of sidetracks and switches in connection with such elevator, according to plans shown on a map attached to and made a part of said contract; to deliver to said elevator all grain originating on its lines and transported thereover, which might be consigned to or in care of said elevator, and to pay the said Peavey on all such grains so transferred through said elevator, a charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but your cross-petitioner was at no time to pay more than the transfer charge customarily made on similar business at similar points. It was further agreed on the part of your cross-petitioner to provide said Peavey, for said elevator, with equal privileges and advantages as granted to other grain elevators that were at the time of the execution of the contract or thereafter located on or served by the Union Pacific Railroad Company at Omaha, Nebraska, or Council Bluffs, Iowa, and that all cars coming from any point on said railroad, either to or from said elevator, and not less than ten miles from Omaha, should be switched, whether loaded or empty, to and from said elevator free of charge. Your cross-petitioner further agreed to receive from and deliver to connecting lines of railroad at Council Bluffs, cars for loading, unloading, or transfer of grain at said elevator as cheaply as charged by it for the same service at any other elevator at Omaha or Council Bluffs, said charges not to exceed in the aggregate in any one year more than five per cent upon the amount invested by the Railroad Company in the yards, tracks, and switches, including the value of the land upon which the same were located, and in addition thereto the cost of such switching service, including taxes and assessments paid upon the instrumentalities used in the performance of such service.

101 8. The said Frank H. Peavey agreed on his part to erect on said premises, and have ready for operation by June 1st, 1899, a first-class elevator, equipped with modern appliances, of a capacity of about one million five hundred thousand bushels of grain, and to transfer promptly all grain loaded on cars delivered by the Union Pacific through the said elevator, and to first transfer and to give the preference in unloading and transferring all grain tendered by the Union Pacific Railroad Company, loaded on Union Pacific Railroad Company's cars or equipment.

9. The said Peavey further agreed that in case the said elevator was destroyed by fire, and not rebuilt in as good condition as before, or that in case he should fail for any cause to operate said elevator for a period of five years, then the said land or real-estate upon which said elevator was located should revert to and become vested in the said Union Pacific Railroad Company.

10. Thereafter the said Peavey erected upon the land in question

an elevator at a cost of about Two Hundred Thousand Dollars, which said elevator was completed in the summer of 1899, and has been continuously operated since that time. About the time of the completion of the elevator the said Frank H. Peavey assigned his interest in the said contract, with the consent of the Union Pacific Railroad Company, to the Omaha Elevator Company, which company was organized for the purpose of acquiring said elevator and business, and your cross-petitioner avers that said elevator has since said time been conducted and operated by said last named company; that the said Omaha Elevator Company assumed all of the terms, burdens, and conditions of the said contract, "Exhibit A."

11. Your cross-petitioner further shows to the Court that after the execution of the said contract, "Exhibit A," and after the operation of the elevator in question, under and in accordance with the terms of said contract, a question arose as to the construction of certain provisions of the said original contract, and in order to definitely settle the meaning of said conditions and terms, a supplemental agreement was entered into between the Union Pacific Railroad Company and the Omaha Elevator Company on the 9th day of July, 1906, a true and exact copy of which said supplemental agreement is hereto attached, marked "Exhibit B," and made a part of this cross-petition by way of reference.

12. Your cross-petitioner further shows to the Court that by virtue of the terms of said supplemental agreement, the transfer and assignment to said Omaha Elevator Company by Frank Peavey of all of his interest, right and title in and to the original contract, "Exhibit A," was approved, ratified, and confirmed by the Union Pacific Railroad Company; that the said supplemental contract further by agreement construed the meaning of the words "promptly transfer" and "promptly release," as used in the original contract with reference to cars loaded with grain destined for said Omaha Elevator Com-
102 pany, by fixing the period of forty-eight hours as a proper period of time in which to promptly transfer the grain and promptly release the equipment of your cross-petitioner, and it was further agreed that in case any loaded car remained at the elevator for more than forty-eight hours before being emptied and released, that in that case it should not be considered as a prompt transfer of the grain nor release of the car within the meaning of the terms of said original agreement, and in that case the Omaha Elevator Company should not be entitled to any transfer charge or elevation allowance thereon. That at or about the time of the execution of the contract last above referred to the situation at Kansas City, Kansas, where Peavey & Co. owned an elevator known as the Midland Elevator, being similar to the situation at Council Bluffs, all of the provisions of the said written contract were made effective with respect to the Midland Elevator Company, and the said last named company has at all times been dealt with, with reference to the elevation of grain, upon exactly the same conditions and terms as set out in the written contract.

13. Your cross-petitioner further shows to the Court that on May 7, 1903, the Interstate Commerce Commission, at the instigation and

upon the request of rival carriers, made an order of inquiry into the validity of the said contracts above set forth. Thereafter a hearing was had, there appearing in said cause your cross-petitioner, the Omaha Elevator Company, and the Midland Elevator Company, and the Atchison, Topeka and Santa Fe Railway Company.

14. Afterwards upon June 25th, 1904, the Commission rendered an opinion, made findings, and entered an order. (See 10 I. C. C., 309), copies of which are hereto attached, marked "Exhibit C." and made a part hereof by way of reference. The Commission found, among other things,

A—That the Union Pacific Railroad Company "could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods, in order to carry to destination the grain originating on its lines."

B—That the loading of cars at the country stations, either because the older cars of the Union Pacific are of low capacity or because of conditions at the points of origin, is in most cases comparatively light, and that the economical movement of the grain for the long distances east of the Missouri River requires a heavier loading of cars than can ordinarily be secured at the local stations of the initial road, and that the original loading of grain on Union Pacific cars generally fell below the loading needful to the cheapest hauling of the grain to remote destinations.

15. The Commission found for these and other reasons, that a transfer of grain at the termini of the Union Pacific on the Missouri River, was important if not absolutely essential that these conditions required that the Union Pacific should either transfer said grain by its own appliances, or employ others to perform the same service.

103 16. The Commission stated the controverted facts, in the case in which these findings and opinions referred to were made, and found to be, as follows: "The contention is that the payment of a cent and a quarter per hundred pounds is excessive, and the resultant effect of operations under said contract, and upon the basis therein provided, is that the Union Pacific Railroad Company discriminates in favor of the two elevator companies as grain shippers; that the allowance of a cent and a quarter per hundred pounds, paid to the said elevator companies for transferring their own grain, amounts in its ultimate result to a rebate because it so much reduces the through published rate, in favor of said elevator companies, but not in favor of other shippers."

17. With reference to the two contentions above named, the Commission found, first, that the allowance to Peavey and Company was not unreasonable. It was contended before the Commission by the rival railway lines "that if the allowance be permitted to stand the other railroads in the competitive territory must necessarily meet it in dealing with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in that territory a grain buying monopoly in favor of the Peavey elevators and a grain haul monopoly in favor of the Union Pacific Railroad Company." To this particular complaint the Commission

replied with the assertion that conditions at Kansas City and Council Bluffs were unlike in more than one important respect; that Kansas City was a grain market, while Council Bluffs was not, and that in the view of the Commission the fact that the other railroads were obliged to also transfer grain at the termini of the various roads, the materiality of such fact was not apparent. The Commission further found that the contracts in question "were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service performed,—the parties were competent to contract, the thing done is proper and necessary to protect the interests of the carrier, the consideration is not excessive, and the honesty of the transaction is unimpeached."

18. The Commission further held that "the Union Pacific was not debarred from dealing with Peavey and Company because they happen to be grain merchants as well as elevator proprietors," and that the mere fact that the benefits of the contract as an incidental result thereby aided another line of business in which the elevator proprietors might happen to be engaged, did not render the transaction unlawful. In passing the Commission said that "it is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. * * *"

104 "In this case, however, we are persuaded upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded, and that the respondent carrier is entitled to a dismissal of the complaint."

19. Your cross-petitioner further shows to the Court that thereafter, in the month of July, 1906, upon the complaint of a rival carrier, the Commission ordered said cause reopened for further evidence and argument. Thereupon a second hearing was had, additional proof adduced, and the matter was submitted to the Commission on both oral and printed arguments. Thereafter on April 9th, 1907, the Commission handed down an opinion and entered a formal order (See 12 I. C. C. Rep., 86), copies of said opinion and order being hereto attached, marked "Exhibit D," and made a part hereof.

20. Your cross-petitioner further shows that in the opinion last referred to, the Commission found:

A—That since the former hearing of the case Omaha had become a grain market of sufficient importance to support fifteen grain elevators and maintain a grain exchange.

B—That since the former hearing the allowance of one and one-quarter cents per hundred pounds theretofore made to Peavey under the contract, had by tariff properly published, been extended to all other elevators at Omaha, Council Bluffs and Kansas City.

C—That the Statutes had in the meantime been so amended as to include "transfer in transit," "storage," and "elevation" as among facilities of transportation which interstate carriers must or may provide for the shippers.

D—That outside of these three changes the conditions remained unchanged.

21. The Commission further found that a carrier had the right, under the law, to provide elevation for its shippers, and that the carrier could either operate an elevator of its own or furnish the same service to its shippers by a suitable arrangement with the owner of an elevator, and that the amount of the compensation or allowance paid was not a matter of concern either to shipper or to other carriers, unless in some way it entered into the rates charged on the grain traffic, or unless by some device a portion of the allowance should be returned to the shipper, and thus become a rebate.

22. The Commission found that the vice of the whole situation at Council Bluffs and Kansas City arose out of the fact that the Peavey interests besides operating the elevators in question for the Railroad Company were also extensive buyers, sellers and shippers of grain.

23. The Commission further found that the allowance as provided by the contract was in excess of the actual cost of the handling of the grain, and therefore, involved a profit, and to that extent constituted a rebate.

105 24. The Commission in the order entered at the same time ordered that the Union Pacific "cease and desist on or before the first day of June, 1907, and for a period of at least two years thereafter abstain from giving or paying one and one-quarter cents per hundred pounds" for the services rendered under the contract, or in accordance with the tariffs at Missouri River points. This order applied, however, only to such owners of elevators as were also engaged in the business of buying, selling and handling of grain in the open market, but by the terms of the said order permitted the Union Pacific to pay an allowance of three-quarters of a cent per hundred pounds for the service described.

25. In this opinion the Commission restricted or narrowed the application of elevation allowances by defining elevation "as unloading grain from cars or grain carrying vessels into a grain elevator, and loading it out again after a period not to exceed ten days; it does not include 'treatment' or grading, cleaning, and clipping of grain; a retention in an elevator beyond ten days becomes storage, and is not a part of the service of elevation as that word is used in the Statute."

26. Again upon April 14th, 1908, the Commission upon petition of the Chicago Board of Trade, and upon numerous protests filed by other interested parties entered an order, a copy of the same being hereto attached as "Exhibit E" and made a part hereof. By the terms of said order the case was set down for further argument upon May 22nd, 1908, and was at said time re-argued without further testimony being offered or permitted. Thereafter upon June 29th, 1908, the Commission filed an opinion, and entered an order in connection therewith, true copies of which opinion and order are hereto attached, marked "Exhibit F", and made a part hereof.

27. In the opinion last above referred to the Commission held, based upon further reflection and further knowledge of the actual operation of the contract between Peavey and the Union Pacific, that "the allowance therefore not only results in an undue preference when paid on grain belonging to the owner of an elevator thus under

contract, but, in effect, is also an unlawful rebate, unless confined to grain that is reshipped within the elevation period of ten days and has not been mixed, treated, weighed, or inspected", and "that the practice of the Union Pacific Railroad Company in paying to Peavey and Company an allowance under such circumstances upon their own grain is unlawful."

28. By the terms of the order last above referred to, the Union Pacific was required to immediately cease and desist for a period of two years from paying any allowance whatsoever to Peavey and Company on their own grain received into any of the elevators at Kansas City and Council Bluffs that is not reshipped out of said elevators within ten days after it has been received therein, and to cease
106 and desist for a period of two years from paying any allowance to Peavey and Company on their own grain, or in which they have any direct or indirect interest, received in the elevators at Kansas City or Council Bluffs, that had been theretofore mixed, treated, weighed, or inspected in any of said elevators.

29. Your cross-petitioner further shows that said last named opinion and order in fact originated by reason of conclusions arrived at by the Commission in the case of the Traffic Bureau Merchants Exchange of St. Louis against Chicago, Burlington and Quincy Railroad Company, et al., submitted to the Commission on the 4th day of December, 1907, and decided by that body on the 29th day of June, 1908, wherein practically the same question was involved as was considered in the hearings prior thereto, had in the Peavey cases. A true copy of the opinion last above referred to found in 14 I. C. C. 317, is hereto attached, marked "Exhibit G," and made a part hereof.

30. The substance of the finding in the case last referred to was that the payment of an elevation allowance of three-quarters of a cent per hundred pounds to elevators located upon the Missouri River constituted an undue and unlawful discrimination, and an order was entered in said cause requiring that the carriers therein named should cease and desist from the payment of all such elevator allowances at Kansas City and other Missouri River points, the order not effective, however, by its terms, until October 1st, 1908. The Court based its opinion in this case principally upon the proposition that when a privilege granted in the nature of things is not desired and cannot be used by other members of the public, it is thereby guilty of a discrimination in favor of the one who can and does use the privilege, and in support of the proposition cited the fact that there were hundreds of inland elevators in the territory affected, which, although performing identical services, were by reason of their location and the nature of the business conducted, unable to avail themselves of the privilege extended by the contracts or tariffs, and upon the further ground that where the proprietor of an elevator performing an elevation service was also engaged in the busines of handling and shipping grain, that he in the course of his business, of necessity had the grain either mixed, treated, weighed or inspected at the elevator.

31. Your cross-petitioner further shows that thereafter, to-wit,

on the 2nd day of December, 1908, the said Commission entered a further order extending the time within which elevation charges should cease to be paid by common carriers at Missouri River points, up until the first day of July, 1909, a copy of which said order is hereto attached, marked "Exhibit H," and made a part hereof.

32. That thereafter, to-wit, on the 17th day of May, 1909, the said Interstate Commerce Commission made a further order extending the time within which elevation allowances at Missouri River points might be paid until the 1st day of January, 1910, a copy of which said order is hereto attached, marked "Exhibit I," and made a part hereof.

107 33. Subsequent to the date of the first opinion rendered by the Interstate Commerce Commission with reference to elevation allowances, to-wit on the 25th day of June, 1904, local conditions at Omaha and Council Bluffs were entirely changed, owing to the fact that a grain market had been established in Omaha, and numerous new elevators built both at Omaha and Council Bluffs, and in contiguous territory, so that as early as the spring of 1906 there were at least 10 terminal elevators at Omaha, Council Bluffs and the switching territory contiguous thereto. In the meantime a flourishing grain exchange had been organized at Omaha and was in full operation in the spring of 1906, thereby greatly increasing and stimulating the movement of grain to Omaha and Council Bluffs as terminal points.

34. Your petitioner further shows that during the year 1905 the Trans-Mississippi Grain Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, constructed in Council Bluffs, Iowa, an elevator of 600,000 bushels capacity upon an agreement with your cross-petitioner that a contract similar to the one with Peavey and Company should be entered into with the Trans-Mississippi Company. Such contract was in fact entered into on the 1st day of August, 1905, by and between your cross-petitioner and the Trans-Mississippi Grain Company, which in terms, was substantially similar to the one entered into with the Peavey Company. A copy of the said contract, together with a supplemental contract between the same companies entered into on the 8th day of March, 1906, are hereto attached as "Exhibits J & K," and made a part hereof.

35. Early in the year 1906, both on account of a desire to cover the Peavey and Trans-Mississippi contracts by a proper tariff, and also to silence the complaints of other elevators located in and near Omaha and Council Bluffs, your cross-petitioner published and filed with the Interstate Commerce Commission a tariff circular G. F. O. No. 888, effective June 27th, 1906, by the provisions of which the elevation allowances at the rate of 1¼ cents per hundred pounds, was extended to all elevators located at South Omaha, Omaha, Council Bluffs and Kansas City, a copy of which said tariff circular is hereto attached marked "Exhibit L," and made a part hereof.

36. Thereafter, to-wit on the 16th day of May, 1907, your cross-petitioner issued and mailed to the Interstate Commerce Commission for filing Circular U. P. G. F. O. 904 superseding No. 888, effec-

tive June 1st, 1907, a copy of which said circular is hereto attached marked "Exhibit M" and made a part hereof. That by the provisions of the said last named circular the allowance was extended to Kansas City, Kansas, in addition to the cities named in the former circular, and a provision made for an allowance of ¾ of one cent per hundred pounds, in lieu of the allowance of 1¼ cents as
108 provided for in the preceding circular. Circular G. F. O. 904 was issued in accordance with an order of the Commission dated April 9, 1907.

37. Subsequent to the opinions of June 29th, both In the Matter of Allowances to Elevators by Union Pacific Railroad Company, and in the case of The Traffic Bureau Merchants Exchange of St. Louis v. Chicago, Burlington & Quincy Railway Company, your cross-petitioner, for the purpose of working in consonance with the principles announced in the opinions last above referred to, issued and mailed to the Interstate Commerce Commission on the 31st day of July, 1908, effective June 29th, 1908, Circular G. F. O. 925, superseding Circular 904, an exact copy of which said circular is hereto attached marked "Exhibit N," and made a part hereof. That by the provisions of the said Circular No. 925, the privilege of the elevation allowance was withdrawn from elevators except those located at Council Bluffs, Iowa, and Kansas City, Kansas, upon the tracks of the Union Pacific Railroad Company. The last named circular, in consonance with the opinion and order of the commission, however, provided that no payment should be made until some court of last resort had determined the liability of the Union Pacific under the contracts with the elevators hereinbefore referred to.

38. Thereafter, to-wit on the 3rd day of October, 1908, your cross-petitioner issued and mailed to the Interstate Commerce Commission its circular G. F. O. No. 929, effective June 29th, 1908, cancelling G. F. O. No. 925, a copy of which said circular is hereto attached and marked "Exhibit O," and made a part hereof. This last named circular was identical with Circular G. F. O. 925, with the exception that in the last circular Hun, Kansas, was added as an originating point.

39. Thereafter, to-wit on the 23rd day of October, 1908, your cross-petitioner issued and mailed to the Interstate Commerce Commission Circular G. F. O. 933, effective December 2, 1908, cancelling Circular No. 929. A copy of said circular No. 933 is hereto attached marked "Exhibit P," and made a part hereof.

40. Your cross-petitioner further shows unto the court that it is the intention of your cross-petitioner to cancel said Circular G. F. O. 933 at the earliest moment possible under the provisions of the Interstate Commerce Act.

41. Your cross-petitioner further shows unto the court that by reason of the order of the Commission of June 29, 1908, ordering your cross-petitioner to cease and desist, for a period of two years, from paying any allowance whatsoever to Peavey & Company, your cross-petitioner has not, since that time, paid or vouchered any sums whatsoever to Peavey & Company, either at Council Bluffs

or Kansas City, Kansas, nor any sums to the Trans-Mississippi Grain Company in payment of allowances provided for by the con-
109 tracts, although both of the companies named have continued to file with your petitioner claims for such allowances, and your petitioner further avers that it has never paid to any other elevator any elevation allowances whatsoever, although claims therefor have been filed by other elevators and judgment obtained on a portion of such claims, as hereinafter more particularly set forth.

42. Your cross-petitioner further shows that in July, 1908, The Updike Grain Company, the Nebraska-Iowa Grain Company, Crowell Lumber & Grain Company, and Nye-Schneider-Fowler Company, all corporations owning elevators located either at Omaha or Council Bluffs and off the rails of the Union Pacific, filed petitions with the Interstate Commerce Commission setting out the issuance and publication by the Union Pacific Railroad Company of Circulars G. F. O. 888 and G. F. O. 904, contending that the forty-eight-hour provision contained in the said circulars was unfair and unlawful for the reason that the same time was allowed elevators at Council Bluffs located on the rails of the Union Pacific, and that it was impossible for the petitioners to receive, empty and return the cars of the Union Pacific within that time. The petitioners further alleged that the elevators at Council Bluffs owned by Peavey & Company and the Trans-Mississippi Grain Company were competitors of the petitioners, and that for years the Union Pacific Railroad Company had paid elevation allowances to the said last named elevators, and that the said practice constituted, as against the petitioners, an unjust and illegal discrimination and preference. They further alleged that between the 26th day of June, 1906, and the 1st day of June, 1907, inclusive, the said petitioners performed services for the Union Pacific Railroad Company in the unloading and return of cars similar to the services performed by the Peavey and Trans-Mississippi companies, and asked the Commission for an order awarding reparation to the petitioners for the full amount of grain so handled, on the basis of ¾ of one cent per hundred pounds. The said claims were presented to the Commission on the 9th day of November, 1908, upon oral and written arguments, and thereafter, on the 6th day of January, 1909, the Commission made certain findings and entered an order of reparation as prayed for in the several petitions. A copy of the opinion, finding and order of the Commission is hereto attached, marked "Exhibit R," and made a part hereof by way of reference.

43. The claims of the various elevator companies were resisted by the Union Pacific upon two grounds: 1st—Because, even though provided for in a published tariff, the elevation allowance had been declared unlawful by the Interstate Commerce Commission and for that reason could not be paid. 2nd—Because, with respect to certain carloads, the terms of the tariff had not been complied with by the various claimants.

44. In the opinion handed down in this case the Commission adopted the view that all the allowances claimed by the petitioners

were upon grain moved between the 27th day of June, 1906,
110 when the first tariff naming these allowances was established by the Union Pacific, and June 28th, 1908, at which latter date the Commission finally held against the lawfulness of an elevation allowance, and that during this period the tariffs set up by the petitioners were maintained by the Union Pacific with the express sanction of the Interstate Commerce Commission, and that payments were made under these tariffs by your cross-petitioner to the competitors of the petitioners at Omaha, and that by reason of such payments to their competitors there had been a serious discrimination practiced against the various petitioners.

45. In the course of the opnion the Commission uses the following language:

"No holding of this Commission can render lawful that which is of itself unlawful, but we have never held that the payment of these elevation allowances was unlawful per se. We have held that such payment worked a discrimination. At first we were of the opinion that under all the circumstances such discrimination ought not to be pronounced undue and therefore unlawful; subsequently, upon a wider range of vision, and especially in view of the results of our previous holding, we reached a contrary conclusion. Although such conclusion has been reached and announced the practice is still continuing with the approval of the Commission. We have postponed the effective date of our order for the purpose of permitting the interests involved to obtain a judicial determination of its lawfulness, and have suggested that in the iterim the payment of these allowances should not be disturbed by reason of our holding. This Commission cannot, without stultifying itself, make any ruling which will condemn as unlawful the payment of these elevation allowances during the time that they have been expressly sanctioned by its decisions. We are clearly of the opinion and hold that payment should be made on account of all cars which admittedly fall within the provisions of these tariffs. * * * It is manifest, therefore, that the Commission intended to approve the payment of these allowances by the Union Pacific only upon the theory that they were extended to all elevators alike and were not confined to the elevators of Peavey & Company."

46. In the order of reparation the Commission found in favor of the various complainants in certain sums not necessary to be enumerated here "as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainants, as more fully and at large appears in and by said report of the Commission, which report is hereby referred to and made a part of this order."

47. Thereafter suits were begun in the Circuit Court of the United States for the District of Nebraska by the various complainants above referred to, and after a full hearing the jury was instructed to return verdicts in favor of the complainants and against your cross-petitioner for the amounts allowed by the Interstate Commerce Commission in the order last above referred to.

111 48. Your cross-petitioner further alleges upon information and belief that in the elevation and handling of grain through said elevators owned and controlled by Peavey & Company the same general custom prevails with reference thereto, to-wit: (*a*) That said grain is all owned by Peavey & Company. (*b*) That same is inspected, weighed, treated or mixed, and a distinct and valuable commercial advantage accrues to the owners of the said elevator by reason of the said inspecting, weighing, treating and mixing of the grain.

49. Your cross-petitioner further alleges upon information and belief that on all of said grain so handled, in accordance with the custom obtaining universally throughout the United States under similar conditions, the owners, in the absence of an elevation allowance and in the natural course of the transaction of their business, would unload and elevate the same grain at their own expense and without cost to the railroad company.

50. Your cross-petitioner further shows that under the rulings of the Interstate Commerce Commission the continuing in force of the contract with Peavey & Company is highly prejudicial to the best interest of your cross-petitioner, and will, as it is informed and believes, result in a multiplicity of suits for large sums of money by reason of the claims of many elevators and mills located in the States of Kansas and Nebraska, which assert they have, during the time covered by the Peavey contract, performed identically the same services as those performed by the elevators owned by Peavey & Company. That the proprietors and owners of said elevators now threaten to bring suits against your cross-petitioner for the recovery of elevation allowances on the grain so handled by the said elevators; and that the said claims amount in the aggregate to many thousands of dollars.

Wherefore, your cross-petitioner prays that upon the final hearing of this action, if the Court finds upon a full hearing and presentation of facts, that the continuing in force of the contract herein sued upon, would be illegal or work a discrimination against competitors of the plaintiff herein, then your petitioner prays that said contract may be cancelled, set aside and held for naught, your petitioner being ever ready to perform all of the conditions in said contract required by it to be performed in case the said contract is held legal and does not work a discrimination against competitors of the plaintiffs herein.

Your petitioner further prays for such other and further relief as to the Court may seem equitable and just or as equity and good conscience may require.

F. C. DILLARD.
R. W. BLAIR.
EDSON RICH.
Solicitors for Cross-petitioner.

N. H. LOOMIS.
Of Counsel.

112 STATE OF NEBRASKA,
Douglas County, ss:

C. J. Lane being first duly sworn on oath deposes and says that he is Ass't Gen. Frt. Agt. of the Union Pacific Railroad Company, cross-petitioner herein; that he has read the foregoing cross-petition and knows the contents thereof, and believes the matters and facts therein set forth within his own knowledge to be true. That in regard to all matters and things in the foregoing cross-bill alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes the same are true.

C. J. LANE.

Subscribed and sworn to before me this 8 day of Nov., 1909.

[SEAL.] H. E. KELLEY,
Notary Public.

EXHIBIT A.

This agreement, made this 7th day of Feb'y, 1899, between Union Pacific Railroad Company, a corporation organized and existing under the laws of the State of Utah and hereinafter called the Railroad Company, party of the first part, and Frank H. Peavey, of Minneapolis, Minnesota, party of the second part,

Witnesseth; That

Whereas, Railroad Company is the owner of a line of railroad extending from Council Bluffs, Iowa, to various points in Nebraska, Kansas, Colorado, Wyoming and Utah; and

Whereas, large quantities of grain are grown along the line of said railroad and shipped over the same and marketed at points beyond the eastern terminus of said railroad at Council Bluffs, Iowa; and

Whereas, it is desirable and advantageous to the Railroad Company that all grain destined for points beyond its terminus shall be transferred and unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use; and

Whereas, the party of the second part is willing to erect an elevator at Council Bluffs, Iowa, as hereinafter mentioned.

Now, therefore, in consideration of the agreements upon the part of each, to be kept, done and performed, and in consideration of the sum of One Dollar to each in hand paid, the receipt whereof is hereby acknowledged, the parties hereto enter into the covenants and agreements following:

113 Article I.

First. Railroad Company will convey to Frank H. Peavey upon demand for the sum of Fifty Dollars ($50.00) by a good and sufficient deed of warranty, subject, however, to the conditions and limitations below expressed, the following described real estate situate in the City of Council Bluffs, County of Pottawattamie, State of Iowa, to-wit:

Commencing at the northeast corner of section three (3) in township seventy-four (74) north of range forty-four (44) west of the 5th Principal Meridian; thence south along the east line of section three (3), 672.9 feet to the point of intersection of said easterly line with the center line of the easterly or main track to the Peavey Elevator, thence southeasterly along said center line of Elevator main track 693.4 feet to a point 45 feet northwesterly from the northwesterly line of the Peavey Elevator, when measured at right angles thereto; being the point of beginning of land leased. Running thence northeasterly at right angles to said center line of Elevator main track 30 feet; thence southeasterly parallel with and 30 feet distant from the center line of said elevator track 300 feet; thence southwesterly at right angles to center line of elevator main track 300 feet; thence northwesterly parallel with and 270 feet distant from center line of elevator main track 300 feet; thence at right angles northeasterly 270 feet to point of beginning, as shown on attached blue-print,—

Containing an area of 90,000 square feet of land, more or less.

Second. It also agrees to convey by a like deed to said second party, subject to like conditions and limitations, from time to time, such additional land adjoining the above described land, as may be required by said second party for any additions to said elevator building.

Third. Said deeds or conveyances are subject to the following conditions: That in case the elevator building to be erected upon said premises by said Peavey or his assigns shall be in any manner injured or destroyed, and shall not be rebuilt or repaired and put in as good condition as before such injury or destruction, within eighteen months from the date of such injury or destruction, or, if said Peavey or his successors shall fail or neglect, for any cause, to operate said elevator for a period of five years, then said real estate shall revert to and become reinvested in said Railroad Company as in its first and former estate; Provided, that thereupon the said Peavey, or his assigns, may remove from said real estate, the said elevator building or other improvements made thereon by him or them, at any time within six months from the time said Railroad Company may, in writing, notify the said Peavey or his successors to remove the same therefrom.

Fourth. Railroad Company will provide upon said real estate for the use of said elevator, on or before the first day of June, 1899, and will maintain, and if it so elects, exclusively operate, during the time said elevator is operated according to this contract, yard room and a system of side-tracks and switches, according to the plans thereof on the map hereto attached and made a part hereof.

114 Fifth. Railroad Company will deliver to said Elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said Elevator, and will pay to Frank H. Peavey, or his assigns, on all such grain transferred through said Elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of this contract, and not exceeding one cent per hundred pounds thereafter,

but at no time shall the transfer charge herein provided to be paid exceed such transfer charge as is customarily made upon similar business at similar points.

Such payments to be made on the 20th day of the month succeeding month in which the transfer service is performed.

Sixth. Railroad Company agrees to provide said Peavey for said elevator, equal privileges and advantages as it may grant to the proprietors of any other grain elevator or elevators that are now, or which may hereafter be, located on or served by said Railroad Company at Omaha, Nebraska, or Council Bluffs, Iowa, and that all cars coming from or going to any point or points on said railroad, to or from said elevator, and not less than ten miles from Omaha, shall be switched, whether loaded or empty, to or from said elevator, free of charge.

Seventh. Railroad Company will receive from and deliver to connecting lines of railroad at Council Bluffs, cars for loading, unloading or transfer of grain at said elevator, as cheaply as charged by it for handling cars for loading, unloading or transfer to any other elevator at Omaha or Council Bluffs, and not exceeding in the aggregate such sum in any one year as will equal five per cent per annum upon the amount invested by Railroad Company in said yards, tracks and switches, including the lands upon which the same are located, and in addition thereto the cost of such switching service, including therein the amount of taxes and assessments paid on its said grounds, yards, switches, side tracks and appurtenances. Such total cost to be apportioned between the several lines for which such services are rendered, according to wheelage, and upon the wheelage basis hereinafter defined.

Eighth. It will permit other lines of railroad connecting with its railroad at Council Bluffs, Iowa, to use said tracks, side-tracks, switches and appurtenances for access to said elevator, upon such other companies severally entering into a satisfactory contract with said Railroad Company, providing that the use of said tracks, side-tracks, switches and appurtenances shall be compensated for by the payment of an equal part of an interest charge upon the value of said property and of the ground of the Railroad Company on which the same are constructed, at the rate of five (5) per cent per annum, payable in equal monthly installments, and also by the payment to said Union Pacific Railroad Company of a wheelage proportion, as hereafter defined, of the cost of maintenance, repairs and operation of said tracks, switches, side-tracks and appurtenances, including taxes and assessments laid and paid thereon, which proportion of aggregate monthly payments for such purposes shall be as the number of cars handled thereon during any month by such connecting or other railroad company over said tracks, side-tracks, switches and appurtenances, or any part thereof, shall be to the whole number of cars or engines handled over the same tracks during the same period; and further agreeing to submit to the rules and regulations respecting the operation and conduct of switching service and car service upon said tracks as said Railroad Company may prescribe; and also providing that such company or companies

so admitted to the use of such tracks and premises, pay all damages to persons or property directly or indirectly caused by its engines, cars, agents or servants while in or upon said premises.

Article II.

First. In consideration whereof, the said party of the second part hereby agrees to erect and complete on said premises, ready for operation, on or before the first day of June, 1899, a first-class elevator, equipped with modern appliances, and thereafter maintain in a like condition, a grain elevator of the capacity of about one million five hundred thousand (1,500,000) bushels of grain.

Second. When said elevator is in operation, to receive from said Railroad Company any grain tendered by it, which originates on the line of said Railroad Company, and which may be consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from said Railroad Company's cars through said elevator, so that such business tendered to said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released.

Third. Second party agrees that in case said elevator shall be injured or destroyed, so that the same cannot be operated, and that if the same shall not, within eighteen months thereafter, be rebuilt or repaired in such manner as to render it substantially in as good condition as before such injury or destruction, then the land above mentioned is to revert to and become invested in the party of the first part.

Fourth. Second party further agrees that in case he shall fail or neglect, for any cause, to operate said elevator in accordance with the terms of this contract, for a period of five years, then said real estate above described shall revert to and become reinvested in said Railroad Company as in its first and former estate.

Fifth. Railroad Company shall not be held or charged for any loss or damage to said elevator building, or for loss or damage to any grain or other property therein, which may occur or happen
116 by or through the escape or communication of fire from the locomotives of said Railroad Company, or the locomotives of any company admitted to use said yards, tracks, side-tracks and appurtenances, while such locomotives are engaged in operating upon said tracks and switches provided by said Railroad Company under the terms of this agreement.

Sixth. When said elevator is in operation, and to the then capacity thereof, that he will at all times when hereafter requested or required by said Railroad Company, receive and safely store in said elevator, for forty-eight (48) hours, free of charge, any grain which may be delivered from said Railroad Company's tracks, originating on the lines of said Railroad Company, and delivered from its tracks at said elevator building for storage or transfer.

Article III.

First. It is mutually understood and agreed between the parties

hereto that all of the provisions of this contract shall be binding upon the successors and assigns of the parties hereto.

Second. It is further agreed that if any corporation now existing, or which shall hereafter be formed and authorized to own and operate said elevator, and the said elevator and lands above described, shall be conveyed to it, and this contract assigned to the same person or corporation, then, upon the assumption by said person or corporation of all the obligations of this contract, and consent to the reservations and conditions of said deed or deeds, the said Peavey shall be discharged from any and all further responsibility hereunder.

Article IV.

If at any time a difference of opinion shall arise in respect to the rights or duties of either party under this agreement, or under the rules which may be adopted by the parties hereto, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent disinterested persons, one of whom shall be chosen by each party to the dispute, and the two so chosen shall select a third. The party desiring such arbitration shall give written notice of the same to the other party, setting forth therein definitely the point or points in dispute, and shall name the person selected by such party to act as arbitrator. If any party served with such notice shall not, within fifteen days after such service, name a second disinterested person to act as arbitrator, the party serving such notice may select the second, and the two thus chosen shall select a third. The Board of Arbitrators thus chosen shall proceed at once to hear, consider and determine the matter submitted to them, and shall give to each of the parties to such matter of difference notice, which shall not be less than ten days, of the time and place of hearing, and at the time and place ap-
117 pointed, shall proceed with the hearing, unless for good cause, of which the arbitrators shall be the judge, it shall be postponed to some later day. And the determination of the Board of Arbitrators thus constituted, or a majority of the persons composing the same, to be made in writing, and a copy thereof to be delivered to each of the parties, shall be final and conclusive upon the parties in reference to all matters thus submitted. The above provisions respecting arbitration shall not be the sole remedy of the parties hereto, but any party may resort to any other legal remedy. The existence of a controversy as to the construction or validity of any covenant or agreement herein shall not delay or affect the performance of any other covenant or agreement. The Arbitrators herein provided for may, in their final judgment, apportion the cost or expense of arbitration between the parties to the controversy, or award the payment of such costs and expenses as may seem to them just. Pending the decision of Arbitrators, the business, settlements or payments affected by such controversy shall be transacted and made in the manner and form existing proir to the raising of such questions by any party claiming relief.

In testimony whereof, the parties hereto have caused these presents to be duly executed.

UNION PACIFIC RAILROAD COMPANY,
By HORACE G. BURT, *President.*

Attest:
ALEX. MILLAR, *Secretary.*

Witness-:
H. G. DICKEY.
W. C. MILLER.

FRANK H. PEAVEY.

[Union Pacific R. R. Co.]

Approved as to form.
W. R. KELLY,
General Solicitor.

118 EXHIBIT B.

Supplemental Agreement.

This supplemental agreement, made this 9th day of July, 1906, by and between Union Pacific Railroad Company, a corporation organized and existing under the laws of the State of Utah, and hereinafter called the Railroad Company, party of the first part, and the Omaha Elevator Company, a corporation organized and existing under the laws of the State of Nebraska, and hereinafter called the Elevator Company, party of the second part, Witnesseth:

Whereas, an agreement has been entered into between the Railroad Company and one Frank H. Peavey of Minneapolis, Minnesota, on the 7th day of February, 1899, hereinafter called the original agreement; and

Whereas, under the terms of Article III of said Original Agreement, the elevator and lands described therein have been conveyed to the said Elevator Company and the said Original Agreement and Contract has been assigned to said Elevator Company by the said Peavey, and the said Elevator Company has assumed all the obligations of the said Peavey under said contract and has consented to the reservations and conditions of the deeds therein described and referred to, and the said Elevator Company has succeeded in all respects to the rights and obligations of said Peavey under said Original Agreement, and

Whereas, as indicated in the preamble to said Original Agreement, the purpose and object thereof was so that

"all grain destined for points beyond the terminus of said railroad at Council Bluffs, Iowa, shall be transferred and unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use,"

And whereas, it is provided in the second section of Article II of said Agreement as follows:

"Second. When said elevator is in operation (said Peavey hereby agrees) to receive from said Railroad Company any grain tendered by it, which originates on the lines of said Railroad Company, and which may be consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from said Railroad Company's cars through said elevator so that such business tendered to said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released."

And whereas, it is advisable and expedient that there should be an understanding and agreement as to the meaning of the words: "promptly transfer" and "promptly released," as used in said section, and as to what shall constitute a prompt transfer of grain and prompt release of the Railroad Company's cars, so as to entitle the said Omaha Elevator Company to the allowance and payment of the transfer charge, as provided in said Original Agreement:

119–164 Now, therefore, it is hereby understood and agreed between the parties hereto that a prompt transfer of grain through said elevator and a prompt release or return of the cars of said Railroad Company carrying the said grain, within the meaning of said terms, as used in said Original Agreement, shall be and mean the transferring of the grain in any car placed at said elevator, and the release and return of the empty car to said Railroad Company within forty-eight hours of the time the loaded car is placed at said elevator, and it is understood and agreed that when any loaded car remains at said elevator for more than forty-eight hours before being emptied and released and returned to the Railroad Company it will not be considered a prompt transfer of the grain nor release of the car, within the meaning of the terms of said Original Agreement, and the said Omaha Elevator Company shall not be entitled to any transfer charges thereon.

In testimony whereof the parties hereto have caused these presents to be duly executed.

UNION PACIFIC RAILROAD COMPANY,
By A. L. MOHLER,
Vice-President & General Manager.
OMAHA ELEVATOR COMPANY,
By E. P. PECK, *Vice-President.*

Dated July 9th, 1906.

* * * * * * *

165 EXHIBIT H.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 2nd Day of December, A. D. 1908.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Upon consideration of the record in the above entitled case,—

It is ordered, That an order heretofore entered in this case and by its terms made effective June 29th, 1908, be and it is hereby so modified as to become effective July 1st, 1909, instead of June 29, 1908.

It is further ordered, That a copy of this order be served upon each of the parties to said proceeding.

166 EXHIBIT I.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 17th Day of May, A. D. 1909.

Present:

Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
James S. Harlan,
Commissioners.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Upon further consideration of the record in the above entitled case, it appearing that several months must still elapse before the

interested parties can obtain judicial determination concerning the validity of the Commission's order.

It is ordered, That the order heretofore entered in said case and by its terms made effective on June 29th, 1908, but afterwards so modified as to become effective on July 1st, 1909, be and it is hereby further so modified as to become effective on January 1st, 1910, instead of on said July 1st.

It is further ordered, That a copy of this order be served upon each of the parties to said case.

Exhibit J.

Agreement, Dated August 1st, 1905, Between Union Pacific R. R. Co. and Trans-Mississippi Grain Co.

Construction of Elevator, etc., Council Bluffs.

This agreement, Made and entered into this 1st day of August, 1905, by and between Union Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, (Hereinafter for convenience called "Railroad Company"), as party of the first part, and Trans-Mississippi Grain Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, (hereinafter for convenience called "Grain Company"), as party of the second part, witnesseth:

167 that whereas, Railroad Company is the owner of a line of railroad extending from Council Bluffs, Iowa, to various points in Nebraska, Kansas, Colorado, Wyoming and Utah; and,

Whereas, large quantities of grain are grown along the line of said railroad and shipped over the same, and marketed at points beyond the eastern terminus of said railroad at Council Bluffs, Iowa; and,

Whereas, it is desirable and advantageous to the Railroad Company that all grain destined to points beyond its terminus, shall be transferred and unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use; and,

Whereas, the Grain Company is willing to erect an elevator at Council Bluffs, Iowa, as hereinbefore mentioned.

Now therefore, in consideration of the agreements upon the part of each of the parties hereto, to be kept, done and performed and in consideration of the sum of one dollar ($1.00) to each in hand paid, the receipt whereof is hereby acknowledged, the parties hereto enter into the covenants and agreements following:

Article I.

Deed.

1. Railroad Company will lease and demise to said Grain Company, for the sum of Fifty Dollars, ($50.00), for the term of

twenty (20) years from the date hereof, subject, however, to the conditions and limitations below expressed, the following described real estate situate in the City of Council Bluffs, County of Pottawattamie, State of Iowa, to-wit:

Description of Land.

Commencing at the northeast corner of Section three (3) in Township seventy-four (74) north of Range forty-four (44) west of the fiftieth principal meridian, thence south along the east line of Section three (3) 1131.6 feet to the point of intersection of said east section line with the center line of the easterly or main track to the Trans-Mississippi Grain Company's Elevator;

Thence northwesterly along said center line of elevator main track, 101.1 feet to a point 94.0 feet southeasterly from the southeasterly line of the Trans-Mississippi Grain Company's Elevator, when measured at right angles thereto, being the point of beginning of the land conveyed;

168 Thence running northeasterly at right angles to said center line of elevator main track 35 feet;

Thence northwesterly parallel with and 35 feet distant from the center line of said elevator track 300 feet;

Thence southwesterly at right angles to center line of elevator main track 400 feet;

Thence southeasterly parallel with and 365 feet distant from the center line of elevator main track 300 feet;

Area.

Thence at right angles northeasterly 365 feet to point of beginning as shown on the plat marked "Exhibit A," hereto attached and made a part of this agreement, containing an area of 120,000 square feet of land, more or less.

Conditions Governing Conveyance of Land.

2. Said lease to be subject to the following conditions: That in case the elevator building hereinafter agreed to be erected upon said premises by said Grain Company, or its successors or assigns, shall not be completed within six (6) months from the date hereof, or if the same after its erection shall be in any manner injured or destroyed, and shall not be rebuilt or repaired and put in as good condition as before such injury or destruction, within eighteen (18) months from the date of such injury or destruction, or if said Grain Company, or its successors or assigns shall fail or neglect, for any cause, to operate said elevator for a period of five years, or if said Grain Company shall fail to comply with all of its covenants and agreements contained in its agreement with said Railroad Company dated August 1, 1905, then said real estate shall revert to and become reinvested in said Railroad Company as in its first and former

estate; the said Grain Company, or its successors or assigns, may remove from said real estate, the said elevator building or other improvements made thereon by it or them, at any time, within six months from the time said Railroad Company may, in writing, notify said Grain Company, or its successors or assigns, to remove the same therefrom.

Tracks.

3. Railroad Company will provide on said real estate for the use of said elevator, on or before the 1st day of January, 1906, and will maintain and if it so elects, exclusively operate, during the time said elevator is operated according to this contract, yard room and a system of side tracks and switches, according to the plans thereof shown on the map hereto attached and made a part hereof, but said Railroad Company may, from time to time, change and modify the location of said tracks, as it may deem proper or necessary for the handling of the business herein provided for.

169 *Compensation for Transferring Grain.*

4. Said Railroad Company will deliver to said elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and until February 7th, 1909, will pay to said Grain Company, its successors or assigns, on all such grain transferred through said elevator, a transfer charge equal to the rate or rates from time to time and currently paid to the Omaha Elevator Company at Council Bluffs, Iowa, or any other elevator rendering like and similar transfer service to said Railroad Company, at either Omaha, Nebraska, or Council Bluffs, Iowa, but only when and while such transfer charges are paid by said Railroad Company to said Omaha Elevator at Council Bluffs, Iowa, or to any other elevator in Omaha, Nebraska, and if such payments are judicially determined to be unlawful, or if from any other cause, the payment of any such transfer charges to any such other elevator is not made, or suspended, the obligations to pay the transfer charges under this agreement is for the corresponding period also suspended. Such compensation for the transfer service to be rendered by the Grain Company, at no time shall exceed the transfer charges customarily made upon similar business at the same or similar points. Such payments to be made upon the 20th day of the following month in which the transfer service is performed, but no transfer charges will be made or imposed against Union Pacific Railroad Company on any grain whatever, switched to or handled through said elevator, which is transported to Omaha or Council Bluffs by any other than Union Pacific Railroad Company.

Term of Contract.

5. The term of this contract is hereby limited to expire on the 1st day of August, 1925, and all rights hereby conferred will then utterly cease and determine.

Switching for Elevator Company.

6. Said Railroad Company agrees to provide said Grain Company for said elevator, equal privileges and advantages as it may grant to the proprietors of any other grain elevator or elevators that are now, or which may hereafter be located on or served by said Railroad Company at Omaha, Nebraska, or Council Bluffs, Iowa, and that all cars coming from or going to any point on said railroad to or from said elevator and not less than ten miles from Omaha, shall be switched whether loaded or empty, to and from said elevator free of charge.

Article II.

1. In consideration whereof the said Grain Company hereby agrees to erect and complete on said premises ready for operation, on or before January 1st, 1906, a first class elevator, equipped with modern appliances, and thereafter maintain in a like condition, a
170 grain elevator of the capacity of six hundred thousand (600,000) bushels of grain, same to be enlarged from time to time as the business demands require.

2. When said elevator is in operation, the Grain Company will receive from said Railroad Company, to the extent of the capacity of said elevator, any and all grain tendered by said Railroad Company, to said Grain Company, for transfer or storage as herein provided, which may originate on the lines of said Railroad Company, whether consigned to said Grain Company or not, and also all grain which may be consigned to said Grain Company or to anyone in care of said elevator, and to promptly transfer said grain from the cars of said Railroad Company through said elevator, so that such grain tendered to said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released.

3. Said Grain Company agrees that in case said elevator shall be injured or destroyed, so that the same cannot be operated, and if the same shall not, within eighteen months thereafter, be rebuilt or repaired in such manner as to render it substantially in as good condition as before such injury or destruction, then the land above mentioned is to revert to and become reinvested in the said Railroad Company.

4. Said Grain Company further agrees that in case it shall fail or neglect, for any cause, to operate said elevator in accordance with the terms of this contract, for a period of five years, then said real estate above mentioned and described shall revert to and become reinvested in said Railroad Company as in its first and former estate.

5. Said Railroad Company shall not be held or charged for any loss or damage to said elevator building, or for loss or damage to any grain or other property therein, which may occur or happen by or through the escape or communication of fire from the locomotives of said Railroad Company, or the locomotives of any company admitted to use said yards, tracks, side tracks and appurte-

nances, while such locomotives are engaged in operating upon said tracks and switches provided by said Railroad Company under the terms of this agreement.

6. When said elevators is in operation, and to the capacity thereof, said Grain Company will at all times, when hereafter requested or required by said Railroad Company, receive and safely store in said elevator, for forty-eight (48) hours, free of charge, any grain which may be delivered from said Railroad Company's tracks, originating on the lines of said Railroad Company; and delivered from its tracks at said elevator building for storage or transfer.

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Article III.

1. It is mutually understood and agreed by and between the parties hereto that all of the provisions of this contract shall be binding upon the successors and assigns of the parties hereto.

2. It is further agreed that if any corporation now existing or which shall hereafter be formed and authorized to own and operate said elevator, the leasehold interest in lands above described, shall be conveyed to it and if this contract shall be assigned to the same person or corporation, then, upon the assumption by said person or corporation of all the obligations of this contract, and consent to the terms of said lease, the said Grain Company shall be discharged from any and all further responsibility hereunder; Provided, such transfer, assignment and assumption shall be first approved by the Railroad Company in writing.

Article IV.

1. If at any time a difference of opinion shall arise in respect to the rights or duties of either party under this agreement, or under the rules which may be adopted by the parties hereto, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent disinterested persons, one of whom shall be chosen by each party to the dispute, and the two so chosen shall select a third. The party desiring such arbitration shall give written notice of the same to the other party, setting forth therein definitely the point or points in dispute, and shall name the person selected by such party to act as arbitrator. If, however, any party served with such notice shall not, within fifteen days after such service, name a second disinterested person to act as arbitrator, the party serving such notice may select the second, and the two thus chosen shall select a third. The Board of Arbitrators thus chosen shall proceed at once to hear, consider and determine the matter submitted to them, and shall give to each of the parties to such matter of difference notice, which shall not be less than ten days, of the time and place of hearing, and at the time and place appointed, shall proceed with the hearing, unless for good cause, of which the arbitrators shall be the judges, it shall be postponed to some later day. And the determination of the Board of Arbitrators thus constituted, or of a

majority of the persons composing the same, to be made in writing, and a copy thereof to be delivered to each of the parties, shall be final and conclusive upon the parties in reference to all matters thus submitted. The above provisions respecting arbitration shall not be the sole remedy of the parties hereto, but any party may resort to any other legal remedy. The existence of a controversy as to the construction or validity of any covenant or agreement herein shall not delay or affect the performance of any other covenant or agreement. The arbitrators herein provided for may, in their final judgment, apportion the cost or expense of arbitration between the parties to the controversy, or award the payment of such costs and expenses as may seem to them just. Pending the decision of the arbitrators, the business, settlements or payments
172 affected by such controversy shall be transacted and be made in the manner and form existing prior to the raising of such questions by the party claiming relief.

In testimony whereof, the parties hereto have caused these presents to be duly executed by their respective officers thereunto duly authorized, attested by their respective Secretaries, with their respective seals attached, the day and date first above written.

UNION PACIFIC RAILROAD COMPANY,
[SEAL.] By A. L. MOHLER,
Vice President and Gen. Manager.

Attest:
JOS. HELLEN,
Asst. Secretary.

TRANS-MISSISSIPPI GRAIN COMPANY,
By F. S. COWGILL, *President.*

Attest:
S. E. BAKER,
Asst. Secretary.
[SEAL.]

EXHIBIT K.

Supplemental Agreement Dated March 8th, 1906, to Original Agreement of August 1st, 1905, Between Union Pacific Railroad Company and Trans-Mississippi Grain Company.

This Supplemental Agreement, made this 8th day of March, 1906, by and between Union Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, as party of the first part, and Trans-Mississippi Grain Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as party of the second part, Witnesseth: Whereas, an Agreement has been entered into between

said companies, dated the 1st day of August, 1905, with reference to the construction and operation of a certain grain elevator building in the city of Council Bluffs, Iowa, (hereinafter called the "Original Agreement").

And whereas, in the preparation of said Original Agreement in its written form, there was an error or mistake in one particular, and said Original Agreement as so prepared and executed does not evidence the real intention and agreement of the parties in the said particular referred to, being the matter referred to below.

Now, therefore, in order to correct the mistake or error referred to, and to make said Original Agreement as written conform in all particulars to the real intention and agreement of the parties
173 thereto, it is hereby agreed that the said Original Agreement shall be and is hereby amended, modified and corrected by striking out from the fourth line of the fourth clause of Article I thereof the words "and until February 7th, 1909," so that hereafter the said fourth clause shall be and read as follows:

"4. Said Railroad Company will deliver to said elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and will pay to said Grain Company, its successors or assigns, on all such grain transferred through said elevator, a transfer charge equal to the rate or rates from time to time and currently paid to the Omaha Elevator Company at Council Bluffs, Iowa, or any other elevator rendering like and similar transfer service to said Railroad Company, at either Omaha, Nebraska, or Council Bluffs, Iowa, but only when and while such transfer charges are paid by said Railroad Company to said Omaha Elevator at Council Bluffs, Iowa, or to any other elevator in Omaha, Neoraska, and if such payments are judicially determined to be unlawful, or if from any other cause, the payment of any such transfer charges to any such other elevator is not made, or suspended, the obligation to pay the transfer charges under this agreement is for the corresponding period also suspended. Such compensation for the transfer service to be rendered by the Grain Company, at no time shall exceed the transfer charges customarily made upon similar business at the same or similar points. Such payments to be made upon the 20th day of the following month in which the transfer service is performed, but no transfer charges will be made or imposed against Union Pacific Railroad Company on any grain whatever, switched to or handled through said elevator, which is transported to Omaha or Council Bluffs by any other than Union Pacific Railroad Company."

And said Original Agreement is not amended or changed or modified in any other particular by this Supplemental Agreement, and all the terms and conditions of said Original Agreement shall be and continue in force with the exception of said amendment, correction and modification by striking therefrom the said words.

In Testimony Whereof, the parties hereto have caused these presents to be duly executed by their respective officers, thereunto duly authorized, attested by their respective secretaries, with their

respective seals attached, the day and date first above written. Executed in Duplicate.

UNION PACIFIC RAILROAD COMPANY,
By A. L. MOHLER,
Vice President and Gen. Manager.

Attest:
—— ——, *Secretary.*

TRANS-MISSISSIPPI GRAIN COMPANY,
By F. S. COWGILL, *President.*

Attest:
S. E. BAKER,
Asst. Secretary.

174 EXHIBIT L.

G. F. O. No. 888.

Union Pacific Railroad Co.

Freight Tariff.

Circular.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of one and one-fourth cents per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain in car loads, transferred by the elevators at South Omaha, Omaha, Council Bluffs and Kansas City—subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, and Muncie, Kansas, and be transported by Union Pacific R. R. from such originating points to South Omaha, Omaha, Council Bluffs, Kansas City, Kansas, or Kansas City, Missouri, respectively.

2nd. The allowance will apply only on grain which moves to points beyond Council Bluffs, Iowa, or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of loads by the Union Pacific to the elevator, or connecting lines and the release and return of the empty — to the Union Pacific. The forty-eight hours' limit will be computed from the time of delivery of the loaded — by the Union Pacific to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific and the return of the empty cars by the connecting lines to recognized points of interchange.

4th. Elevator Companies, in presenting their claims for the above allowance, must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined—same to be subject to verification by the Union Pacific R. R. Co.

Issued June 27, 1906.
Effective June 27, 1906.

By J. A. MUNROE,
Freight Traffic Manager, Union Pacific R. R., Omaha, Neb.
ELMER H. WOOD,
G. F. A., Union Pacific R. R., Omaha, Neb.
CHARLES J. LANE,
1st A. G. F. A., Union Pacific R. R., Omaha, Neb.
W. H. GARRATT,
A. G. F. A., Union Pacific R. R., Omaha, Neb.
H. G. KAILL,
A. G. F. A., Union Pacific R. R., Kansas City, Mo.

175 EXHIBIT M.

Circular U. P. G. F. O. No. 904.

Supersedes No. 888.

Union Pacific Railroad Company.

The Topeka & Northwestern Railroad Company.

Allowance to Elevators Located at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. or the Topeka & Northwestern R. R. (not connecting lines), west of and including Gilmore, Nebraska, and Muncie, Kas., and be transported by Union Pacific R. R. or by The Topeka & Northwestern R. R. and Union Pacific R. R., from such originating points to South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., or Kansas City, Mo., respectively.

2nd. The allowance will apply only on Grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight

hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, or connecting lines and the release and return of the empty cars to the Union Pacific R. R. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific R. R. to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific R. R. and the return of the empty cars by the connecting lines to recognized points of interchange.

4th. Elevator Companies, in presenting their claims for the above allowance must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

176 Issued and mailed to I. C. C. May 16, 1907.

Effective June 1, 1907, by order of Interstate Commerce Commission.

By J. A. MUNROE,
Freight Traffic Manager, Union Pacific Railroad, The Topeka & Northwestern R. R., Omaha, Neb.
ELMER H. WOOD,
G. F. A., Union Pacific R. R., T. & N. W. R. R., Omaha, Neb.
C. J. LANE,
1st A. G. F. A., Union Pacific R. R., T. & N. W. R. R. Omaha, Neb.
W. H. GARRATT,
A. G. F. A., Union Pacific R. R., T. & N. W. R. R. Omaha, Neb.
H. G. KAILL,
A. G. F. A., Union Pacific R. R., T. & N. W. R. R. Kansas City, Mo.

EXHIBIT N.

Circular G. F. O. No. 925.

Cancels No. 904.

Union Pacific Railroad Company.

Allowances to Elevators Located at Council Bluffs, Ia., and Kansas City, Kan., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourth- of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at the termini and upon the tracks of the Union Pacific R. R.

at Council Bluffs, Ia., and Kansas City, Kan., subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. (not connecting lines), west of and including Gilmore, Nebraska, and Muncie, Kan., and be transported by Union Pacific R. R., from such originating points to Council Bluffs, Iowa, or Kansas City, Kan., respectively.

2nd. The allowance will apply only on Grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, and the release of the empty cars. The forty-eight hours' limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators.

4th. Elevator Companies, in presenting their claims for the above allowance, must substantiate, by duly certified records
177 of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

5th. No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made. The reasons for this circular are that the Interstate Commerce Commission upon June 29, 1908, ordered that no such payments should be made. The owners of these elevators claim, however, that Union Pacific Railroad Company is bound to make the payments under long existing contracts and threaten suit under the same. This circular is therefore made to preserve all the rights of the parties and still comply with the order of the Commission, thus enabling the questions presented to the Commission to be ultimately determined by the courts.

Issued and mailed to I. C. C. July 31, 1908.

Effective June 29, 1908, by order of Interstate Commerce Commission, Case No. 687.

By J. A. MUNROE,
Freight Traffic Manager, Union Pacific Railroad, Omaha, Neb.

EXHIBIT O.

Circular G. F. O. No. 929.

Cancels No. 925.

Union Pacific Railroad Company.

Allowance to Elevators Located at Council Bluffs, Ia., and Kansas City, Kan., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per

100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at the termini and upon the tracks of the Union Pacific R. R., at Council Bluffs, Ia., and Kansas City, Kan., subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, Muncie and Hund, Kan., and be transported by Union Pacific R. R. from such originating points to Council Bluffs, Iowa, or Kansas City, Kan., respectively.

2nd. The allowance will apply only on Grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, and the release of the empty cars. The forty-eight hour limit will be computed from time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators.

4th. Elevator Companies, in presenting their claims for the
178 above allowance, must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

5th. No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made. The reasons for this circular are that the Interstate Commerce Commission upon June 29, 1908, ordered that no such payments should be made. The owners of these elevators claim, however, that Union Pacific Railroad Company is bound to make the payments under long existing contracts and threaten suit under the same. This circular is therefore made to preserve all the rights of the parties and still comply with the order of the commission, thus enabling the questions presented to the Commission to be ultimately determined by the courts.

Issued and mailed to I. C. C. October 3, 1908.

Effective June 29, 1908, by order of Interstate Commerce Commission, Case No. 687.

By J. A. MUNROE,
Freight Traffic Manager, Union Pacific Railroad, Omaha, Neb.

EXHIBIT P.

In Lieu of I. C. C. No. 2199 Rejected by Interstate Commerce Commission.

Circular G. F. O. No. 933.

Cancels No. 929.

Union Pacific Railroad Company.

Allowance to Elevators Located at Council Bluffs, Ia., and Kansas City, Kan., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourth- of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at the termini and upon the tracks of the Union Pacific R. R., at Council Bluffs, Ia., and Kansas City, Kan., subject to the following conditions:

1st. The grain must originate at points on the Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, Muncie and Hund, Kan., and be transported by Union Pacific R. R. from originating points to Council Bluffs, Iowa, or Kansas City, Kan., respectively.

2nd. The allowance will apply only on Grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, and the release of the empty cars. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators.

179 4th. Elevator Companies, in presenting their claims for the above allowance, must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

5th. No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made. The reasons for this circular are that the Interstate Commerce Commission upon June 29, 1908, ordered that no such payments should be made. The owners of these elevators claim, however, that Union Pacific Railroad Company is bound to make the payments under long existing contracts and threaten suit under the same. This circular is therefore made to preserve all the rights of the parties and still comply with the order of the commission,

thus enabling the questions presented to the Commission to be ultimately determined by the courts.

Issued and Mailed to I. C. C. October 23, 1908.

Effective December 2, 1908.

By J. A. MUNROE,
Freight Traffic Manager, Union Pacific Railroad, Omaha, Neb.

EXHIBIT R.

Opinion No. 767.

Before the Interstate Commerce Commission.

No. 1628.

NEBRASKA-IOWA GRAIN COMPANY
v.
UNION PACIFIC RAILROAD COMPANY.

No. 1642.

CROWELL LUMBER & GRAIN COMPANY
v.
SAME.

No. 1655.

UPDIKE GRAIN COMPANY
v.
SAME.

No. 1644.

CAVERS ELEVATOR COMPANY
v.
SAME.

No. 1775.

NYE-SCHNEIDER FOWLER GRAIN COMPANY
v.
SAME.

Submitted November 9, 1908. Decided January 6, 1909.

Edward P. Smith, C. J. Smyth, W. D. McHugh, and A. H. Murdock for Complainants.

Edson Rich, N. H. Loomis, and F. C. Dillard for defendant.

180 *Report and Order of the Commission.*

1. The various complainants herein seek reparation caused by alleged undue discrimination against them in favor of compet-

itors in elevator allowances made by defendant at Omaha and Council Bluffs; defendant declined to pay these allowances, alleging that they were unlawful and that the terms of the tariffs were not complied with: *Held*, That this Commission can not, without stultifying itself, make any ruling which will condemn as unlawful the payment of these allowances during the time they have been expressly sanctioned by its decisions.

2. The Commission finds with respect to all the shipments involved in these cases that the provision in the tariffs requiring a return to defendant of the car within forty-eight hours as a condition precedent to the payment of the allowance is unjust, unreasonable, unduly discrim-atory, and unlawful; and that complainants are entitled to damages by reason of the maintenance of such unlawful provision which equal the amount which would have accrued to them by way of this elevation allowance, provided the tariff had contained no such provision. Defendant has paid to competitors of complainants this elevation allowance; it has at the same time declined to pay it to complainants. The Commission finds that defendant's reason for so declining is not a valid one, and that it has been guilty of undue discrimination against complainants, for which they are entitled to recover as damages the difference between what has been paid to their competitors and to them.

3. Reparation awarded in case No. 1628 for $2,509.74 and interest.

4. Reparation awarded in case No. 1775 for $1,560.79 and interest.

5. Reparation awarded in case No. 1642 for $698.29 and interest.

6. Reparation awarded in case No. 1655 for $6,742.10 and interest.

7. Reparation awarded in case No. 1644 for $1,013.71 and interest.

Edward P. Smith, C. J. Smyth, W. D. McHugh, and A. H. Murdock for complainants.

Edson Rich, N. H. Loomis, and F. C. Dillard for defendant.

181 *Report of the Commission.*

PROUTY, *Commissioner:*

The above cases were heard together. The prayer in all is for reparation, and while the facts differ somewhat in the various cases the essential features are the same and may be stated in a single report.

By tariff effective June 27, 1906, the Union Pacific Railroad Company provided for the payment, under certain conditions named in the tariff, of 1¼ cents per 100 pounds for the unloading into elevators at Omaha and Council Bluffs of grain transported by it from certain points upon its line in Nebraska. By tariff effective June 1, 1907, the amount of this allowance was reduced to three-

fourth of a cent per 100 pounds, all the other conditions remaining the same. The complainants all operate grain elevators at Omaha or Council Bluffs, and the purpose of this proceeding is to obtain payment for the elevation of several thousand carloads of grain brought to Omaha by the Union Pacific from the points specified in the above tariffs and unloaded by the complainants into their elevators.

The Union Pacific declines to make payment upon two grounds: First, because, with respect to all the carloads so unloaded, the payment of the elevation allowance was unlawful and cannot therefore be made, even though provided for in the tariff; second, because, with respect to certain carloads, the terms of the tariff were not complied with.

In 1899 the Union Pacific Railroad Company entered into a contract with Peavey & Company for the construction of an elevator at Council Bluffs, by the terms of which the Union Pacific agreed to pay, under certain conditions, 1¼ cents per 100 pounds upon all grain transferred through such elevator. Under this contract the Omaha elevator was built and subsequently operated.

The attention of this Commission being called to the existence of this contract, and it being alleged that payments under it were in reality rebates, an investigation was undertaken, as the result of which the Commission decided, June 25, 1904, that payments under this contract were not then unlawful. In the Matter of Allowances to Elevators by the Union Pacific Railroad Company, 10 I. C. C. Rep., 309.

The only elevator located upon the rails of the Union Pacific Company at either Omaha or Council Bluffs are the Omaha Elevator and the Trans-Mississippi elevator. Previous to the decision of the Commission above referred to, the Union Pacific had made payment of this 1¼ cents to these two elevators, but had declined to make a similar allowance to other elevators at Omaha and Council Bluffs not located upon its rails. By its tariff effective June 27, 1906, and hereinbefore referred to, the payment of these allowances was extended to all elevators at Omaha and Council Bluffs.

182 During the year 1906 the attention of the Commission was once more directed to this matter, and as a result the former case was reopened and a further hearing had. On April 9, 1907, the Commission again decided that the payment of these allowances at Omaha and Council Bluffs by the Union Pacific was not unlawful. In the matter of Allowances to Elevators by the Union Pacific Railroad Company, 12 I. C. C. Rep., 85.

Still later, upon application of certain interests at Chicago, this matter was further considered, and the conclusion now reached that payment to the Omaha Elevator under the Peavey contract for handling grain owned by that elevator, as it was actually handled, was illegal. This decision was promulgated June 29, 1908. In the Matter of Allowances to Elevators by the Union Pacific Railroad Company, 14 I. C. C. Rep., 315.

The payment of these allowances by the Union Pacific Company

at Omaha compelled similar payments by its competitors at that point, and this in turn extended to other markets upon the Missouri River. The grain interests of St. Louis complained to the Commission that the making of these allowances at the Missouri River, while they were not made at St. Louis, worked a discrimination against that grain market, and upon this complaint the Commission reexamined the whole subject. It now held that this service at the Missouri River was not a transfer, but elevation; not required by the railroad, but performed for the benefit of the grain dealer, and that payment by the carrier for that service was an undue discrimination and unlawful. Traffic Bureau, Merchants Exchange of St. Louis vs. C. B. & Q. Ry. Co., 14 I. C. C. Rep., 317.

At the time of deciding the St. Louis case the Commission ordered the defendants in that case to cease and desist from the payment of such allowances upon the Missouri River on and after October 1, 1908. That date has since been postponed until July 1, 1909 The Union Pacific Railroad Company was not a party to the proceeding in which that order was made, but the Commission did direct that company to cease and desist from these payments under the Peavey contract. The effective date of that order has since been extended until July 1, 1909.

It will be seen, therefore, that the Commission has finally decided that the payment of elevation allowances like those for which the complainants seek to recover is unlawful. The defendant contends that it should not make an unlawful payment and that certainly this Commission ought not to direct a payment the unlawfulness of which it has itself declared.

183 All the carloads in question moved between July 27, 1906, when the first tariff naming this allowance was established by the Union Pacific, and June 29, 1908, when the decision of the Commission finally holding against the lawfulness of the allowance was promulgated. During this entire period these tariffs were maintained by the Union Pacific with the express sanction of this body. It is furthermore conceded that during that time extensive payments were made under these tariffs by the Union Pacific Company to the competitors of these complainants at Omaha, and that similar allowances were made by other carriers to various elevators at Omaha and at other points upon the Missouri River. If, therefore, these complainants do not now recover these allowances, there arises against them a serious discrimination.

This commission is an administrative body. The rates, regulations, and practices which it establishes within its jurisdiction become rules of action which may and must enter into the business dealings of this country. It may be necessary to change from time to time these rulings as varying conditions require, but they should never be changed except upon due notice to the public, which is affected by them, and it would be altogether intolerable if the change could be made retroactive.

No holding of this Commission can render lawful that which is of itself unlawful, but we have never held that the payment of

these elevation allowances was unlawful *per se*. We have held that such payment was discrimination. At first we were of the opinion that under all the circumstances such discrimination ought not to be pronounced undue and therefore unlawful; subsequently, upon a wider range of vision, and especially in view of the results of our previous holding, we reached a contrary conclusion. Although such conclusion has been reached and announced, the practice is still continuing, with the approval of this Commission. We have postponed the effective date of our order for the purpose of permitting the interests involved to obtain a judicial determination of its lawfulness, and we have suggested that in the interim the payment of these allowances should not be disturbed by reason of our holding. This Commission cannot, without stultifying itself, make any ruling which will condemn as unlawful the payment of these elevation allowances during the time they have been expressly sanctioned by its decisions. We are clearly of the opinion and hold that payment should be made on account of all cars which admittedly fall within the provisions of these tariffs.

Both the tariffs above referred to provide that the payment shall only be made, first, where the grain is subsequently loaded out of the elevator and sent east; second, when the car is unloaded and returned to the Union Pacific Company within forty-eight hours. It is conceded that all the grain in question was subsequently loaded
184 out for shipment east and therefore that the first condition has been complied with, but many of the cars were not returned to the Union Pacific within the forty-eight hours, and the serious question before us arises upon this provision.

Most of the elevators at Omaha and Council Bluffs are located at points off the iron of the Union Pacific. As a rule they are reached from the Union Pacific over some railroad system which acts as a switch line between the Union Pacific and the elevator, although in one, and perhaps more than one, instance the railroad which performs this service is purely a local concern. The elevator of the Nebraska-Iowa Grain Company is located upon the tracks of the Burlington, and the manner in which carloads of grain reach this elevator fairly represents the general situation and presents the questions involved.

Grain shipped over the Union Pacific into Omaha and Council Bluffs is first placed upon an inspection track, where it is, or may be, given an official inspection and grade, and where the grain itself is often sold. The owner designates the disposition which is to be made of the grain while it is upon this track. If a delivery to the Nebraska-Iowa elevator is directed, the Union Pacific moves the car to what is known as its transfer track, where it is taken possession of by the Burlington and moved over its line to the elevator of the Nebraska-Iowa Company. The Union Pacific charges $2 for the movement from the inspection track to the transfer track, and the Burlington charges another $2 for the movement from the transfer track to the elevator, both of which switching charges are added to

the freight bill and collected by the Union Pacific Company, which settles with the Burlington Company for its services.

It frequently happens that Burlington cars are furnished by the Union Pacific at its stations in Nebraska for the shipment of grain into Omaha. If, now, a Burlington car is taken by that company for movement to the elevator of the Nebraska-Iowa Grain Company, it passes out of the possession of the Union Pacific and into the possession of its owner. There is no way in which the Nebraska-Iowa Company can cause the return of that car to the Union Pacific within the forty-eight hours or at any other time. The car is in the possession of the railroad which owns it and ought not to be returned to the Union Pacific. This situation arises out of the manner in which cars are interchanged in the handling of business between the Union Pacific and the Burlington systems.

It is apparent, therefore, that in case of this Burlington car the condition which the Union Pacific has imposed in its tariff is an absolutely impossible one to the Nebraska-Iowa Company. If this carload had been delivered at an elevator upon the line of the Union Pacific, like the Omaha or the Trans-Mississippi, the car when unloaded would of necessity have been returned to the Union Pacific and the elevation allowance would have become payable. It follows, therefore, that there arises out of the application of this tariff to the ordinary method of transacting this business a necessary and unavoidable discrimination in favor of elevators located upon
185 the line of the Union Pacific and against those located upon other lines like that of the Nebraska-Iowa Company. The complainants insist that as applied to a transaction like this the provision in the tariff that cars shall be returned within forty-eight hours is discriminatory and unlawful and should be disregarded.

Harlan, Commissioner, speaking for the Commission in its second report in the so-called Peavey case, said:

"We adhere to the view expressed in the original report and opinion of the Commission, that such an arrangement embracing, as it now does, all the available elevators at the points named, and not being confined to the Peavey elevators alone, is not in itself unlawful. By whatever name it may be called the service actually rendered is in fact elevation, and may be so regarded under the amended act. It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation to other shippers over its lines, for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers who, for any reason, cannot use the Peavey elevators. In the Matter of Allowance to Elevators by the Union Pacific Railroad Company, 12 I. C. C. Rep., 88."

It is manifest, therefore, that the Commission intended to approve the payment of these allowances by the Union Pacific Company only upon the theory that they were extended to all elevators alike and were not confined to the elevators of Peavey & Company.

It is equally manifest that this tariff excludes the Nebraska-Iowa

Company from participation in this allowance when grain is shipped to its elevator in the car of the Burlington Company, although if shipped to the elevator of Peavey & Company in the same car the allowance would be paid. An unjust discrimination necessarily arises out of this combination of circumstances. It avails the Union Pacific nothing to say that by the terms of its published tariff this allowance is open to the Nebraska-Iowa Company, when by its method of business it absolutely precludes that company from obtaining it.

It may be suggested that the complainant by selecting the proper car in which to load its grain might avoid this result, but, in the first place, when the grain is loaded at the station in Nebraska, it is not always, nor perhaps in the majority of instances, settled to what elevator it will finally go. The title to this grain is often passed after the car reaches the inspection track. Can that system be lawful which prohibits the Nebraska-Iowa Company from purchasing grain which the Union Pacific has brought to Omaha in a Burlington car under penalty of a discrimination against it by the amount of this elevation allowance?

186 In the second place, and still more to the point, the grain shipper may not be able to select the car in which his grain is to be transported. The Union Pacific furnishes the car. In doing so it makes no distinction to the shipper between different cars which are offered. If that company desires to excuse itself from the consequence of these conditions by appropriating a certain car to the movement of certain grain it must at least so advise the shipper at the point of origin and furnish a suitable car for the desired destination. Nothing of the kind appears in these cases. This grain was offered for shipment to Omaha and for delivery at Omaha. All cars tendered by the Union Pacific for its movement must be counted as the cars of the Union Pacific Company.

Some attempt was made upon the argument to claim that the Union Pacific Company might with propriety accord this allowance to the Omaha elevator while refusing it to the Nebraska-Iowa Grain Company, the shipment being, in both cases, in a Burlington car, for the reason that the Union Pacific made more out of the transaction when the unloading was upon its own rails. An examination of the facts would, however, indicate the contrary.

The Union Pacific Company must pay the Burlington a per diem for the use of the car so long as it remains in its possession, but that payment stops as soon as the car is delivered into the possession of its owner. In case, therefore, of the car which is unloaded at the Omaha elevators the Union Pacific must perform a switching movement from the inspection track to Omaha elevator, must move the car from the Omaha elevator back to the transfer track and must pay the Burlington road its per diem during whatever time is required for the making of these various movements, while, when the car is unloaded at the Nebraska-Iowa elevator, the only movement is to the transfer track and the per diem stops as soon as the car is received upon that track by the Burlington Company.

We are of the opinion that a practical application of this forty-eight-hour condition to cases where the car is owned by the road which performs the switching service to the elevator works an unjust discrimination against the owner of the elevator and that with respect to such shipments the rule itself must be held to be unlawful.

The rules of the American Railway Association, of which all the railroads entering Omaha are members, provide that loaded cars received in switching service shall be confined to the switching territory, and must be, when empty, returned to the owner, if there is a direct connection within the territory. Otherwise, the empty car may be returned to the road from which it was received or may be loaded, generally speaking, in the direction of the road which owns the car. The Union Pacific and all the other railroads entering Omaha are members of this association and were, during all the time covered by this contract, operating in the interchange of cars under the above rules.

The elevator of the Updike Grain Company is located upon the railroad of the Union Stock Yards Company, which is a local line extending from Omaha to the stock yards at South Omaha
187 and having connection with most of the railroads entering Omaha. It does not appear whether this railroad is or is not a member of the American Railway Association, but the case does show that previous to the publication by the Union Pacific Company of either of the tariffs involved the Union Stock Yards issued, with the approval of the Union Pacific Company, a circular indicating the disposition which would be made of cars rendered empty upon its line, and it was admitted upon argument that the disposition of such cars provided for by this circular was in accordance with rules of the American Railway Association above quoted.

As already indicated the Union Stock Yards Railroad makes direct connection with most of the systems entering Omaha, and since many of the cars in which this grain was transported to the elevator of the Updike Company belong either to the Union Pacific or to system having direct connections with the Stock Yards Railroad, it was the imperative duty of that railroad to return these cars when empty to their owners.

The traffic manager of the Updike Grain Company testified that, being uncertain as to the proper application of the forty-eight-hour provision in the tariff, he applied to the general freight agent of the Union Pacific Company, with a view to ascertaining what disposition should be made of these cars when empty which belonged to other railroads than the Union Pacific. He was informed by that company that such cars should not be returned to the Union Pacific, but should be loaded out for the east, in accordance with the rules of the railway association. This same gentleman further testified that it was the custom of his company to call up the Union Pacific offices from day to day for the purpose of ascertaining what was to be done with particular cars as they became empty, and that they were loaded without exception in accordance and in consequence of instructions received.

The Updike Company claims that by virtue of this arrangement with the Union Pacific Company it was relieved from the duty of returning these empty cars and that it is entitled to the allowance although they have not been returned, inasmuch as failure to return them was due to the direction of the Union Pacific to send them elsewhere.

This claim of the Updike Company we are not prepared to sustain. If this were a contract between that company and the Union Pacific Railroad Company for the performance of some service and if payment for that service were conditioned upon the return of the empty car, clearly the Union Pacific Company might waive the performance of that condition. But these tariffs are not matters of contract. They furnish rules for the guidance of the general public. They cannot be varied from, even though it may be for the interest in a particular case both of the shipper and of the railway that they should be. If the Union Pacific Company and the Updike Grain Company desired to make a different disposition of these cars from that required by the terms of the tariff, the tariff should have been amended accordingly.

188 The question remains, therefore, whether, omitting from consideration the instructions of the Union Pacific Company as to the disposition of these cars, the forty-eight-hour provision is binding upon the Updike Company. As already stated, the Union Stock Yards Railroad has direct connection with most railway systems entering Omaha. The larger part of the foreign cars unloaded at the Updike elevator belonged to these systems. It was therefore the positive duty to the Stock Yards Railroad, in accordance both with its circular and with the rules of the railway association to make delivery of these cars when empty to their owners. No valid distinction can be drawn between a Burlington car unloaded at the Updike elevator and the same car unloaded at the elevator of the Nebraska-Iowa Grain Company. In the latter case the car is actually in the possession of the Stock Yards road, which is under obligation to return it to that owner, and which does so. Certainly the Union Pacific Company cannot insist that the Stock Yards Railroad shall violate the very rules which it has been instrumental in establishing and upon the observance of which it is daily insisting, as a condition precedent to obtaining the payment of this elevation allowance by the Updike elevator. In both cases compliance with the forty-eight-hour provision is impossible with the elevator not situated upon the rails of the Union Pacific. The holding which we have made with respect to cars belonging to the railroad which performs the switching service must apply with equal force to cars owned by railroads which have direct connection with the switching road.

There still remain in the specifications of all these complainants a certain number of cars belonging to roads which do not have a direct connection with the switching road.

The rules of the American Railway Association, already referred to, require that the car shall be returned when empty to its owner when that owner has a direct connection within the switching territory. In such case the road in whose possession the empty car is

has no option; the car cannot be returned to the Union Pacific Company. When, however, the car is the property of some railroad having no such direct connection, it may either be returned to the railroad from which it was received or loaded out in such a way that the road owning it will participate in the haul. Apparently it is optional with the switching road to determine whether it shall be returned or loaded out; the elevator cannot direct the disposition of the car. If this is so the condition, in case of the foreign car not owned by a direct connection, is just as impossible of execution as if the car were the property of a direct connection, since the elevator company cannot in either event secure a return of the car.

Assuming that the elevator company could direct the return of the car to the Union Pacific, the same result must follow
189 for the reason that no distinction can be made between the foreign car which belongs to the railroad upon which the elevator is located or the foreign car which belongs to a railroad having a direct connection with the switching territory of Omaha and the foreign car which belongs to some line not having such direct connection without occasioning necessary discrimination. If, for example, shipment is made from a point upon the Union Pacific in a Burlington car, to be unloaded at the Updike elevator or the Nebraska-Iowa elevator, under our previous holdings the elevator must of necessity receive this elevation allowance. If shipment is made to the Omaha elevator in either a Burlington or a Baltimore & Ohio car, that elevator must of necessity receive the allowance. But if the Baltimore & Ohio car is sent to either the Nebraska-Iowa elevator or the Updike elevator the allowance may not accrue, since it may not be possible to return that car to the Union Pacific at any time, and certainly not within the forty-eight hours. The shipper who has shipped grain to Omaha and holds it for sale upon the inspection track of the Union Pacific in a Burlington car can obtain more for that grain from the Nebraska-Iowa elevator by 1¼ cents per 100 pounds than as if the same grain had been loaded and shipped in a Baltimore & Ohio car. This discrimination results not from any lack of diligence upon the part of the shipper nor from any disadvantage of location upon his part, but entirely from the acts of the Union Pacific Company itself. In our opinion, a condition which necessarily results in discrimination of this sort cannot be a reasonable or lawful requirement, and we are constrained to hold that, as applied to foreign cars of all descriptions, the forty-eight-hour provision is void.

This leaves for consideration Union Pacific cars which are not returned within the forty-eight-hour period. The complainants insist that with respect to these cars, which may be returned, and indeed must be returned, the rule is unreasonable and therefore unlawful, because the time allowed is too short. They insist that while it may be possible in some instances to make return of the car within the forty-eight-hour limit, it is not, as a practical matter, possible to do so in the majority of instances and that the requirement ought to be held void for this reason.

If the validity of this provision as applied to these cars depended

upon the considerations stated by the complainants we should hardly be inclined to sustain their contention. The alleged purpose of the Union Pacific in paying this allowance at all is to obtain a prompt release of its equipment. It may therefore, in our opinion, properly fix a time limit within which such equipment shall be released. This limit must be a reasonable one, but we are not prepared to say that forty-eight hours for the return of these grain cars would be unreasonable.

190 It appears that railroads operating within the switching territory of Omaha and Council Bluffs have agreed on a period of four days as a suitable time to be allowed for the switch movement and the complainants urge that this shows the unreasonableness of the forty-eight hour limit; but it must be remembered that this applies to the handling of all kinds of traffic and that the free time allowed the shipper for the unloading of his freight is forty-eight hours, which is part of the four days. This case shows that grain can be unloaded at elevators, and was unloaded at the elevators of these complainants, in from two to six hours after the placing of the car.

A representative of the Burlington road testified that in his opinion from four to four and a half days would be a reasonable time for the handling by his company of carloads of grain from the Union Pacific to the elevator of the Nebraska-Iowa Company and the return of the empty car. But this witness was examined at some length as to the detail of this movement and his answers go far toward warranting a finding that forty-eight hours would be sufficient if the car was in fact immediately unloaded. There are probably elevators within this switching territory from which the empty car could not be returned within the forty-eight hours, but it is not certain that the Union Pacific need allow a sufficient time for the return of these cars from all elevators, no mat-er how situated. It may not establish a rule the effect of which shall be to pay this allowance to elevators upon its own iron and nowhere else; but neither need it make the time so long that every elevator, no matter where located, can under all circumstances comply with it.

But even if it be assumed that forty-eight hours is a reasonable time within which to return Union Pacific equipment, still it must be held with respect to these cars, as in the case of foreign cars, that the condition is unlawful. This grain moves in all kinds of equipment, and to apply this time provision to Union Pacific cars when it can not be applied to others creates a necessary discrimination.

The case show that from some elevators practically all cars which ever come back to the Union Pacific are returned within the forty-eight hours, but that from other elevators it is almost impossible to return any cars within that limit. This is for various reasons but mainly because the switch movement is over two lines and therefore requires a longer time.

Assume, now, two elevators so situated that it is ordinarily impossible to comply with this provision. A carload of grain is shipped to one of these elevators in a Union Pacific car and upon that no elevation can accrue. The same quantity of grain is shipped to the

other elevator in a foreign car, and upon that the elevation allowances must accrue. So long as this railroad indiscriminately furnishes for the movement of this grain its own and foreign equipment it is impossible to make any application of this provision which will not result in discrimination between shippers. All these cars, no matter by whom owned, must, when tendered by the Union Pacific Company for the transportation of this grain, be accounted the cars of that company, and it must not establish any tariff
191 regulation which will impose a higher rate for the transportation of grain when contained in one car than when shipped in another.

We find with respect to all the shipments involved in all these complaints that the provision in the tariff requiring a return to the Union Pacific Company of the car within forty-eight hours as a condition precedent to the payment of the allowance is unjust, unreasonable, unduly discriminatory, and unlawful, and that the complainants are entitled to damages by reason of the maintenance of such unlawful provision which equal the amount which would have accrued to them by way of this elevation allowance provided the tariff had contained no such provision. The Union Pacific Company has paid to the competitors of these complainants this elevation allowance. It has at the same time declined to pay it to the complainants. We find that its reason for so declining is not a valid one, and that the defendant has been guilty of an undue discrimination against the complainants, for which they are entitled to recover as damages the difference between what has been paid to their competitors and to them.

We find in case No. 1628, Nebraska-Iowa Grain Company v. Union Pacific Railroad Company:

That the complainant between July 2, 1906, and July 22, 1907, unloaded at its elevator 183 carloads of grain, containing in the aggregate 12,104,900 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 11,898,260 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $1,487.28; that upon 206,640 pounds the allowance was at the time of its unloading ¾ cent per 100 pounds or $15.50, making a total of $1,502.78.

That the said complainant between said dates unloaded 14 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 877,820 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $109.73.

That the said complainant between said dates unloaded 110 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company; that the contents of these cars aggregated 7,722,040 pounds; that upon 6,961,500 pounds of this amount the tariff allowance at the time it

was unloaded was 1¼ cents per 100 pounds, or $870.19; that upon 360,540 pounds the allowance at the time of its unloading was ¾ cent per 100 pounds, or $27.04, making a total of $897.23.

That the said complainant did not unload any cars belonging to foreign roads having no direct connection within the switching territory.

192 We therefore find that the complainant Nebraska-Iowa Grain Company is entitled to recover of the defendant the sum of $2,509.74 with interest at 6 per cent from July 22, 1907.

We find in case No. 1775, Nye-Schneider-Fowler Grain Company v. Union Pacific Railroad Company:

That the complainant between January 1, 1907, and December 31, 1907, unloaded at its elevator 4 carloads of grain, containing in the aggregate 211,780 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that an elevation allowance of 1¼ cents per 100 pounds was made, amounting to $26.40.

That the said complainant between said dates unloaded at its elevator 126 cars belonging to foreign roads or the Union Pacific, which were returned to the Union Pacific Company more than forty-eighth hours from the time they were received from that company; the said cars aggregated 8,496,950 pounds, that upon 5,841,130 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, amounting to $720.13, and that upon 2,655,820 pounds the allowance was at the time of its unloading ¾ of a cent per 100 pounds, amounting to $199.19, making a total of $919.32.

That the said complainant between said dates unloaded 68 cars belonging to foreign roads having no direct connection within the switching territory and which were not returned to the Union Pacific Company; that the aggregate contents of said cars were 4,658,560 pounds; that upon 4,175,610 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds or $521.95, and that upon 482,950 pounds the allowance at the time of its unloading was ¾ of a cent per 100 pounds, or $36.22, making a total of $558.17.

That the said complainant between said dates unloaded 8 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific; that said cars contained in the aggregate 507,540 pounds; that upon 372,930 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $46.81, and that upon 134,610 pounds the allowance was at the time of its unloading ¾ of a cent per 100 pounds, or $10.09, making a total of $56.90.

We therefore find that the complainant, Nye-Schneider-Fowler Grain Company, is entitled to recover of the defendant the sum of $1,560.79 with interest at the rate of 6 per cent from December 31, 1907.

We find in case No. 1642, Crowell Lumber and Grain Company v. the Union Pacific Railroad Company:

That the complainant between August 10, 1906, and December

26, 1907, unloaded at its elevator 33 carloads of grain, containing in the aggregate 2,004,936 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 1,904,-
193 380 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, amounting to $238.17, and upon 99,550 of this amount the tariff allowance at the time it was unloaded was ¾ cent per 100 pounds, amounting to $7.40, making a total of $245.57.

That the said complainant between said dates unloaded 8 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 532,310 pounds of grain; that the elevation allowance at the time it was unloaded was 1¼ cents per 100 pounds, amounting to $66.54.

That the complainant between said dates unloaded at its elevator 58 cars belonging to foreign roads or to the Union Pacific Company containing in the aggregate 3,669,340 pounds, which were returned to the Union Pacific more than forty-eight hours from the time they were received from that company. Of this amount, 2,199,550 pounds *was* on a tariff allowance of 1¼ cents per 100 pounds at the time it was unloaded, or $274.94, and that upon 1,469,790 pounds the allowance was, at the time of the unloading, ¾ cent per 100 pounds, or $110.24, making a total of $385.18.

That the said complainant did not unload any cars belonging to foreign roads having no direct connection within the switching territory.

We, therefore, find that the complainant, Crowell Lumber & Grain Company, is entitled to recover of the defendant the sum of $698.29, with interest at the rate of 6 per cent from December 26, 1907.

We find in case No. 1655, Updike Grain Company v. Union Pacific Railroad Company:

That the complainant between July 1, 1906, and July 1, 1907, unloded at its elevator 103 carloads of grain, containing in the aggregate 6,457,140 pounds, where the cars were returned to the Union Pacific within forty-eight hours, and upon this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $807.14.

That the said complainant between said dates unloaded 313 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific Company; that such cars contained in the aggregate 20,585,820 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $2,573.32.

194 That the said complainant between said dates unloaded 355 cars belonging to foreign roads having no direct connection within the switching territory and which were never returned to the Union Pacific Company. That the aggregate contents of said

cars were 23,436,960 pounds of grain, and that the elevation allowance of 1¼ cent per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $2,929.62.

That the said complainant between said dates unloaded 54 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company. The contents of these cars aggregated 3,456,230 pounds of grain, and the elevation allowance, according to the tariff rates at the time of the unloading at 1¼ cents per 100 pounds, amounted to $432.02.

We find, therefore, that the complainant Updike Grain Company is entitled to recover of the defendant the sum of $6,742.10 with interest at 6 per cent from July 1, 1907.

We find in case No. 1644, Cavers Elevator Company v. Union Pacific Railroad Company:

That the complainant between June 21, 1906, and July 9, 1907, unloaded at its elevator 6 carloads of grain, containing in the aggregate 423,185 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 390,005 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $48.75, and that upon 33,180 pounds the allowance was at the time of its unloading ¾ cent per 100 pounds, or $2.49, making a total of $51.24.

That the said complainant between said dates unloaded 41 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory, and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 2,707,262 pounds; that upon 2,478,442 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $309.80, and that upon 228,820 pounds the allowance was at the time of its unloading three-fourths cent per 100 pounds, or $17.16, making total of $326.96.

That the said complainant between said dates unloaded 40 cars belonging to foreign roads having no direct connection within the switching territory which were never returned to the Union Pacific; that the aggregate contents of said cars were 2,366,945 pounds; that upon 2,046,785 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $255.84; and that upon 320,160 pounds the allowance was at the time of its unloading ¾ cent per 100 pounds, or $24.01, making a total of $279.85.

That the said complainant between said dates unloaded 45 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific more than forty-eight hours from the time they were received from that company, containing in the aggregate 2,633,775 pounds; that upon 2,562,675 pounds of this amount the tariff allowance at the time it was unloaded was
195 1¼ cents per 100 pounds, or $340.33, and that upon 71,100 pounds the allowance at the time of its unloading was ¾ cent per 100 pounds, or $15.33, making a total of $355.66.

We, therefore, find that the complainant Cavers Elevator Company is entitled to recover of the defendant the sum of $1,013.71 with interest at the rate of 6 per cent from July 9, 1907.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 6th Day of January, A. D. 1909.

Present:

Martin A. Knapp,
Judson C. Clements,
Charles A. Prouty,
Francis M. Cockrell,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Commissioners.

No. 1628.

NEBRASKA-IOWA GRAIN COMPANY
v.
UNION PACIFIC RAILROAD COMPANY.

No. 1642.

CROWELL LUMBER & GRAIN COMPANY
v.
SAME.

No. 1655.

UPDIKE GRAIN COMPANY
v.
SAME.

No. 1644.

CAVERS ELEVATOR COMPANY
v.
SAME.

No. 1775.

NYE-SCHNEIDER-FOWLER GRAIN COMPANY
v.
SAME.

196 These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved

having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That defendant Union Pacific Railroad Company be, and it is hereby, authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1628, the Nebraska-Iowa Grain Company, the sum of $2,509.74, with interest thereon at the rate of 6 per cent per annum from July 22, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1775, the Nye-Schneider-Fowler Grain Company, the sum of $1,560.79, with interest thereon at the rate of 6 per cent. per annum from December 31, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, *or* on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1642, the Crowell Lumber & Grain Company, the sum of $698.29, with interest thereon at the rate of 6 per cent. per annum from December 26, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipment of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

197 It is further ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1655, the Updike Grain Company, the sum of $6,742.10, with interest thereon at the rate of 6 per cent. per annum from July 1, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said *said* report of the Commission, which said report is hereby referred to and made a part of this order.

And it is further ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1644, the Cavers Elevator Company, the sum of $1,013.71, with interest thereon at the rate of 6 per cent per annum from July 9,

1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the commission, which said report is hereby referred to and made a part of this order.

198 Afterwards, to wit, on the 19th day of November, 1909, a stipulation was filed. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY and MIDLAND ELEVATOR COMPANY, Complainants,
vs.
UNION PACIFIC RAILROAD COMPANY et al., Defendants.

Stipulation.

For the purpose of expediting the hearing herein, it is agreed that all the allegations of the cross-bill of the Union Pacific Railroad Company shall be considered as put in issue without a formal answer, to the same extent as though formal answer in the nature of denial had been filed and a general replication filed thereto, and all the averments in the pleadings heretofore filed on behalf of the other parties shall be treated as a part of an answer to such cross-bill, and the same shall be treated as though general replication had been filed thereto.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
N. H. LOOMIS,
Solicitor for Defendant Union Pacific Railroad Company.
A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Defendants, Members of the Interstate Commerce Commission.

199 Afterwards, to-wit, on the 19th day of November, 1909, a stipulation was filed.
Said stipulation is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY et al., Complainants,
vs.
UNION PACIFIC RAILROAD COMPANY et al., Defendants.

Stipulation.

It is hereby agreed that the following evidence may be used in the trial of the above entitled cause, the said evidence being in addition to that provided for in the stipulation heretofore entered into by and between the parties to said action:

1st. That portion of the evidence taken in the proceeding before the Interstate Commerce Commission entitled, "Traffic Bureau Merchants Exchange of St. Louis vs. Chicago, Burlington & Quincy R. R. Co., No. 1239," and the cases consolidated therewith, being Nos. 1240, 1241, 1263 and 1267, as hereinafter set forth, the said testimony being hereto attached as Exhibit 1.

But it is understood and agreed that either party may present to the court the testimony, in full or in part, of any witness or witnesses who testified in either of the said causes before the Interstate Commerce Commission.

2nd. The parties hereto admit that C. J. Lane, First Assistant General Freight Agent of Union Pacific Railroad Company, if present at the trial, would testify as shown by his affidavit hereto attached and made a part hereof as Exhibit 2.

3rd. Each party hereto reserves the right, if any exhibit attached to the cross-bill of Union Pacific Railroad Company, hereto-
200 fore filed herein, is claimed to be incorrect, to present at the final hearing the original or a certified copy of such exhibit.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
R. W. BLAIR,
EDSON RICH,
Solicitors for Union Pacific Railroad Company.
A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

EXHIBIT 1.

Excerpts from Testimony Given before the Interstate Commerce Commission at the Hearing at St. Louis, Mo., October 23, 1907, *in the Case of "Traffic Bureau Merchants Exchange of St. Louis vs. Chicago, Burlington & Quincy R. R. Co., No.* 1239," *and the Cases Consolidated Therewith, being Nos.* 1240, 1263, 1241 *and* 1267.

W. D. WASHER, produced as a witness in behalf of the complainant, having been first duly sworn, testified as follows:

Mr. LINCOLN: What is your business?

Mr. WASHER: Secretary and Treasurer of the Washer Grain Company, of Atchison, Kansas.

Mr. LINCOLN: Do you own and operate an elevator at that point?

Mr. WASHER: I do.

201 Mr. LINCOLN: You are engaged in buying and selling grain, are you?

Mr. WASHER: I am.

Mr. LINCOLN: You purchase largely at points in Kansas and Nebraska?

Mr. WASHER: Yes, sir.

Mr. LINCOLN: In making your purchases at points in Kansas and Nebraska, do you not make your bids conditional upon weights and grades?

Mr. WASHER: Yes.

Mr. LINCOLN: And inspection?

Mr. WASHER: On inspection and weights.

Mr. LINCOLN: In order to ascertain the correct weight of grain it is necessary to elevate it, is it not?

Mr. WASHER: It is; it is necessary to elevate it at Atchison.

Mr. LINCOLN: As a matter of fact are not all of your purchases of grain at Atchison, Kansas, unloaded into an elevator?

Mr. WASHER: Practically all, yes sir.

Mr. LINCOLN: Is it not necessarily a part of your business that you should have that grain unloaded so as to inspect, examine and know what you are getting?

Mr. WASHER: It is.

Mr. LINCOLN: You have been operating at Atchison for some time, have you not?

Mr. WASHER: Yes, sir.

Mr. LINCOLN: Until recently you were not receiving an elevation allowance of three quarters of a cent a hundred pounds for loading out onto other rails, were you?

Mr. WASHER: Not until recently.

Mr. LINCOLN: You meant during that period that you were not receiving the allowance the competition of other Missouri River grain dealers, did you not?

Mr. WASHER: I did.

Mr. LINCOLN: They were having their grain handled free?
Mr. WASHER: They were.
Mr. LINCOLN: Did you feel the effect of that competition?
202 Mr. WASHER: Very decidedly.
Mr. LINCOLN: Why did you feel the effect of that competition?
Mr. WASHER: Because our competitors who were afforded free elevation service were apparently in the position to handle their grain to much better advantage, so much better advantage that they were able to compete with us most successfully.
Mr. LINCOLN: Since you have been receiving elevation allowances do you experience the trouble in getting your share of the business that you did before?
Mr. WASHER: Not so much as we did before.
Mr. LINCOLN: By getting an elevation allowance did it give you the rate you sought?
Mr. WASHER: Partially.
Mr. LINCOLN: Practically all grain which comes from Kansas and Nebraska points into the Missouri River, and particularly to Atchison, is sold on Atchison terms.
Mr. WASHER: You might say all the grain we buy is bought on Atchison terms.
Mr. LINCOLN: Which means the Atchison weights and grades.
Mr. WASHER: Which means the Atchison weights and grades, yes, sir.
Mr. LINCOLN: The shipper in the country knows nothing about the official destination of that property, does he?
Mr. WASHER: As long as it is bought on Atchison weights and grades, it is of course none of his affairs, so far as the final destination is concerned.
Mr. LINCOLN: So far as the shipper is concerned, Atchison is the destination.
Mr. WASHER: Atchison is the destination so far as his settlement is concerned.
Mr. LINCOLN: Do you buy grain at Atchison on consignment?
Mr. WASHER: Very little on consignment; it is bought practically by bids and contracts in the country.
Commissioner PROUTY: In what market do you sell your grain?
203 Mr. WASHER: We sell our grain in various markets, where the demand is the best. We sell it very largely in the south and southeast, in Memphis, and in the southeastern states, and at the Gulf Ports.
Commissioner PROUTY: Do you sell for export?
Mr. WASHER: Occasionally, when the situation justifies and conditions warrant it.
Commissioner PROUTY: Do you sell in St. Louis?
Mr. WASHER: We do.
Commissioner PROUTY: To any considerable extent?
Mr. WASHER: Not largely recently, no, sir.
Commissioner PROUTY: In Chicago?

Mr. WASHER: Very little to Chicago. We do when conditions there warrant it. As an ordinary proposition the tendency is to sell that grain in southern markets.

Commissioner PROUTY: Do you sell in Texas?

Mr. WASHER: Occasionally, when the market is sufficiently high.

Commissioner PROUTY: But the southeast is your best market?

Mr. WASHER: As an ordinary proposition the Gulf Ports and the southeast.

Commissioner PROUTY: You said the granting of the elevator allowance gave you partial relief. Is there something more you think you are entitled to?

Mr. WASHER: We do not consider that three-quarters of a cent a hundred is a compensating allowance as compared with the free elevation afforded to our competitors.

Commissioner PROUTY: Do you own you- own elevator?

Mr. WASHER: We do.

Commissioner PROUTY: You say three-quarters of a cent does not pay the expense of the elevation?

Mr. WASHER: We do not consider it pays the expense and interest upon the value of our plant.

Commissioner PROUTY: Do I understand that free elevation is allowed your competitors.

204 Mr. WASHER: Yes, sir.

Commissioner PROUTY: Where and how?

Mr. WASHER: At Leavenworth, Kansas, and Coffeyville in the operation of free elevators by the Missouri Pacific Railroad, at the points mentioned and by other roads at Kansas City.

Commissioner PROUTY: You think that the free elevation is a more attractive proposition to the shipper than the three-quarters of a cent?

Mr. WASHER: I would consider it so, yes, sir.

Commissioner PROUTY: Would you as a shipper prefer the free elevation?

Mr. WASHER: Well, as a shipper I would not care to build an elevator and operate is at three-quarters of a cent a hundred, as compared with someone else who would build and operate the elevator for nothing.

Commissioner PROUTY: Well, you are a grain dealer. As a grain dealer, would you rather have three-quarters of a cent allowance, or would you rather have your elevator?

Mr. WASHER: That is a proposition that is personal to the extent that I already have an elevator.

Commissioner PROUTY: Well, suppose you had no elevator. Would you take your free allowance or build an elevator?

Mr. WASHER: I would take the free allowance unquestionably; but I don't want to do away with the elevator and have no allowance.

Mr. COCHRAN: That is because you own the property, have made the investment?

Mr. WASHER: That is because I was unfortunate enough to make the investment.

Mr. COCHRAN: At the time this free elevation was allowed your grain had the same rates in the elevator, if you had the grain coming in there, that the grain of anybody else had?

Mr. WASHER: It had the same rates, yes, but coming in at the same rates left my investment absolutely confiscated.

205 Commissioner PROUTY: I understand that, but you had an elevator at Atchison, and you had no allowance for it.

Mr. WASHER: None.

Commissioner PROUTY: But as far as your handling of grain was concerned, if you had any grain at Kansas City or at any point where free elevation was allowed, your grain would receive the same benefit at those points that any other grain would receive?

Mr. WASHER: The same benefit that any other grain would receive, yes, but I would be out the expense of moving my entire force and handling capacity, and I would not have my facilities there.

Commissioner PROUTY: I understand, but I also understand you to say that simply from the standpoint of a grain dealer, and irrespective of your investment in this elevator, you would much prefer free elevation, or that all elevator charges be abrogated?

Mr. WASHER: I did not say I would prefer that. Irrespective of all those things you have mentioned I can see no objection to that.

Commissioner PROUTY: Would you or would you not prefer free elevation if you had no elevation——

Mr. WASHER: If I had no elevation—that is a matter that is very hard to determine, upon the situation I do not understand exactly what you are driving at.

Commissioner PROUTY: As a grain dealer, without an elevator, would you prefer free elevation, or would you prefer to pay three-quarters of a cent a hundred on your grain?

Mr. WASHER: That would be immaterial to me, so long as others in my line of business were on an equal basis. It would be immaterial to me in every way.

Commissioner PROUTY: It would make no difference?

Mr. WASHER: It would make no difference so long as I was on a parity with others similarly engaged.

Commissioner PROUTY: Would you be able to pay the same price for grain if you had no elevator allowance that you do pay with an elevator allowance, at three-quarters of a cent?

206 Mr. WASHER: Not if someone else was having the same service that it was costing me to perform, performed for nothing.

Commissioner PROUTY: In other words, if you were to entirely wipe out the elevator allowance and all free elevator service, what effect would that have upon the price of grain paid to the producer or the price charged the consumer?

Mr. WASHER: Then the buyers of grain would be compelled to pay for the cost of unloading and weighing and elevating the grain, and it would naturally reflect upon the price paid the producer, I should think.

Commissioner PROUTY: Just as an increase in the freight would?

Mr. WASHER: Virtually, yes.

Mr. COCHRAN: That would give the man who raised the grain a lower price, would it not?

Mr. WASHER: I should think so.

See pages 99 to 109, inclusive, original record.

BRUCE INMAN, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows:

Mr. LINCOLN: What is your business?

Mr. INMAN: I represent the Millikan Helm Commission Company at Omaha.

Mr. LINCOLN: You are representing the Millikan Helm Commission Company, of St. Louis in purchasing grain in Nebraska?

Mr. INMAN: Yes, in Nebraska and Iowa, with an office at Omaha.

Mr. LINCOLN: You are bidding for grain in Nebraska points in competition with Omaha buyers?

Mr. INMAN: Yes, sir.

Mr. LINCOLN: Will you please explain to the Commission what your experience there has been in connection with the purchase of grain?

207 Mr. INMAN: Well, I am of course, St. Louis *not* having the elevation, handicapped to the extent of three-quarters of a cent or whatever the elevation is, in my purchases. In other words, an Omaha buyer could pay that three-quarters of a cent a hundred more than I can, and by having the benefit of that three-quarters of a cent elevation he has that much advantage of me. If my people here had that elevation I could pay just three-quarters of a cent more for the grain in Nebraska and Iowa than I do now.

Mr. LINCOLN: Is it not the rule and practice at Omaha for grain received at that market to be weighed and inspected there?

Mr. INMAN: Their bids specify Omaha terms, which means Omaha weights and grades.

Mr. LINCOLN: That means, then the unloading of all cars?

Mr. INMAN: Yes, they could not fulfill their terms without unloading them.

Mr. LINCOLN: So far as the original shipper is concerned, Omaha is the final destination and final market?

Mr. INMAN: Yes, sir.

Mr. LINCOLN: The Omaha man in purchasing grain at Hastings, Nebraska—that is a point that we may consider, and I think the rate is 12 cents to Omaha, is it not?

Mr. INMAN: I am not familiar with that rate.

(A gentleman present suggested it was 12.6 cents.)

Mr. LINCOLN: The Omaha grain man in purchasing grain at Hastings, Nebraska, will be able to pay a price at Omaha, to pay a rate of 12.6 cents into Omaha, that being the rate on wheat. He would receive on that shipment three-quarters of a cent elevation. You are bidding at Hastings for direct shipments to St. Louis?

Mr. INMAN: Yes, sir.

Mr. LINCOLN: Would you not have to make your price based on the through rate of 21.6 cents?

Mr. INMAN: Yes, sir.

Mr. LINCOLN: You would have no opportunity to get anything back?

Mr. INMAN: No, sir.

208 Mr. LINCOLN: Has not the Omaha man an advantage through his elevation of three-quarters of a cent a hundred pounds against you in purchasing grain at Hastings?

Mr. INMAN: Yes, exactly.

Mr. LINCOLN: And you can explain in what respect?

Mr. INMAN: If he gets three-quarters of a cent, if he gets that for elevation, he could put it to St. Louis for just three-quarters of a cent less. That is, he gets the three-quarters of a cent less per hundred that this market does not enjoy.

Mr. LINCOLN: Have you had any experience there in bidding for grain at the point of origin, Hastings or some point in Nebraska, as against the Omaha man, and have you found that he has bought the grain from the shipper and resold the grain to you at St. Louis?

Mr. INMAN: I don't know that I have personally bought from them. I don't know but what I could illustrate the point by a conversation I have had with brokers at various times. For instance, I get the Omaha bid every morning. I get the Chicago bids too. I have my own and have other St. Louis bids. At times this summer, for instance, Chicago was buying grain out that way. I know of instances where they were selling to Chicago and the prices they were selling at. I would see they were bidding about what they were selling at. Well, they would get the three-quarters of a cent elevation. That will explain it as near as anything I can think of. That is, they can buy and sell it at the same price and make a little money. Of course if we had that we could pay just that much more for the grain, and not having it we are handicapped that much.

Commissioner PROUTY: When you buy grain in Nebraska on what terms do you buy it?

Mr. INMAN: St. Louis?

Mr. LINCOLN: St. Louis inspection?

Mr. INMAN: St. Louis weights and grades, yes.

Commissioner PROUTY: Which does the farmer like best. Omaha terms or St. Louis terms?

Mr. INMAN: Well, that is a difference of opinion, I sup-

209 pose. Some would prefer one and some the other. There is no special preference in that regard that I know of.

Commissioner PROUTY: You do not find any disadvantage against St. Louis in that respect?

Mr. INMAN: It is a little bit further to St. Louis, that is all. Sometimes a man would prefer a market a little closer home, or something of that kind.

Commissioner PROUTY: Is grain ever sent into Omaha to be sold on commission?

Mr. INMAN: Yes.

Commissioner PROUTY: Is grain ever sent to St. Louis to be sold on commission?

Mr. INMAN: Yes, sir.

Commissioner PROUTY: Is it sent to both places from that country up there in Nebraska?

Mr. INMAN: Yes sir.

Mr. COCHRAN: You are in the grain brokerage business?

Mr. INMAN: I am not a broker. I represent these people on a salary.

Mr. COCHRAN: In the brokerage business?

Mr. INMAN: No. I represent this firm alone on a salary. The difference between a broker and a salaried man is that one gets paid so much a bushel——

Mr. COCHRAN: In dealing with that subject your view is this: If you purchase grain, say at Hastings, Nebraska, in that market, you pay the full rate to St. Louis, without any return by way of elevator charge, you are just three-quarters of a cent worse off than the man who buys the same grain at the same price in the same market, who is allowed the elevator allowance?

Mr. INMAN: Yes, sir.

Mr. COCHRAN: Is that it?

Mr. INMAN: Yes, sir.

Mr. COCHRAN: Suppose the cost to the man who operates the elevator in three-quarters of a cent a hundred. He has to pay
210 out that much. Then is he not in the same position that you are?

Mr. INMAN: No, indeed. He can get the three-quarters of a cent back and I do not.

Mr. COCHRAN: But suppose that three-quarters of a cent back is the actual cost of the elevator service and he has to pay that out in handling the grain, is he any better off than you are?

Mr. INMAN: I think so. If we have that same charge we have that same expense here that he has at Omaha or St. Joe or Leavenworth or Kansas City, we perform that same service here that he performs there, but we do not get anything back for it.

Mr. COCHRAN: Your idea is, if I understand you correctly that if the St. Louis grain merchent or dealer had got the same advantage as to elevator service here in St. Louis that he gets in Omaha and at these other points, that then there is no cause for complaint?

Mr. INMAN: I don't understand your question.

Mr. COCHRAN: Do I understand you to say that if a grain merchant shipping grain, say from Nebraska to St. Louis, gets a free elevator service here in St. Louis on that grain, or at least gets three-quarters of a cent per hundred on that grain, and the elevators of St. Louis, the same as is paid other men at Hastings and Omaha, that then the position is equal?

Mr. INMAN: That is my understanding, that is my judgment. I understand that there is no complaint or cause for complaint at Hastings. You spoke of Hastings?

Mr. COCHRAN: I say that or any other point where there might be an elevator.

Mr. INMAN: That is my judgment.

Mr. SPENCER: That the discrimination you complain of is that the elevators in St. Louis are not allowed three-quarters of a cent on all grain that goes out of them?

Mr. INMAN: If my people enjoyed that I could pay three-quarters of a cent a hundred more for that stuff than I can now. The Omaha man or the Kansas man that I have in there has just that much of his expense paid that we do not have paid.

211 Commissioner PROUTY: If your people sell in the southeastern territory they get that allowance of three-quarters of a cent already. Do you think they ought to have it twice?

Mr. INMAN: That end I don't know anything about.

Mr. SPENCER: Is your firm in the elevator business here?

Mr. INMAN: Yes.

Mr. SPENCER: And what they really — is three-quarters of a cent for elevating it here?

Mr. LINCOLN: We will have their witnesses on the stand.

Mr. INMAN: I cannot say what they want, because I have had no conference with them.

See pages 110 to 118, inclusive, original record.

GEORGE F. POWELL, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows:

Mr. LINCOLN: What is your business?

Mr. POWELL: Grain Dealer, St. Louis, Missouri.

Mr. LINCOLN: You are engaged in purchasing grain for shipment at St. Louis?

Mr. POWELL: Yes.

Mr. LINCOLN: Do you buy grain in Kansas and Nebraska?

Mr. POWELL: Nebraska.

Mr. LINCOLN: In bidding for grain in Nebraska, what particular markets do you come in competition with?

Mr. POWELL: We come in competition with the Missouri River bidders and others.

Mr. LINCOLN: Will you kindly state to the Commission in what way, if it does, the elevation allowance *is* made at the Missouri River to the grain dealers on the Missouri River affects you as related to your purchase of grain at points in Nebraska, for St. Louis.

Mr. POWELL: The Missouri River grain dealers are competitors in the same territory in which we sell grain, and any advantage
212 that they get at the Missouri River, in the way of an elevation allowance, necessarily put *is* at a corresponding disadvantage here if we do not get it.

Mr. LINCOLN: Are you operating an elevator at St. Louis?

Mr. POWELL: No; we operate through the public elevators here.

Mr. LINCOLN: In purchasing grain for shipment from Nebraska points to St. Louis you purchase on what might be known as St. Louis terms?

Mr. POWELL: Yes, St. Louis weights and inspection.

Mr. LINCOLN: And in order to ascertain those weights does not the grain have to go into the elevator?

Mr. POWELL: Yes, sir; it is necessary to unload the grain in the elevators.

Mr. LINCOLN: In the handling of your grain into the elevators do you pay the elevator company for the handling of that grain?

Mr. POWELL: Yes, sir.

Mr. LINCOLN: What do you pay at St. Louis?

Mr. POWELL: One-half of one cent a bushel, which covers ten days' storage.

Mr. LINCOLN: Do the railroads bringing that grain in contribute toward the payment of that expense?

Mr. POWELL: No, sir.

Mr. LINCOLN: Are you familiar with the methods in vogue on the Missouri River?

Mr. POWELL: By hearsay, by the testimony that has been brought out here.

Mr. LINCOLN: They buy their grain on Missouri River terms, do they not?

Mr. POWELL: Yes.

Mr. LINCOLN: They receive a contribution for the elevation of the grain if they handle it through an elevator on the outbound shipment?

Mr. POWELL: Yes.

Mr. LINCOLN: Do you buy grain in Omaha and Kansas City?

213 Mr. POWELL: No, we buy grain west of Omaha and Kansas City.

Mr. LINCOLN: Do you buy any grain at Omaha and Kansas City?

Mr. POWELL: Very occasionally.

Mr. LINCOLN: Why do you not buy grain there?

Mr. POWELL: Because the Omaha and Kansas City people, instead of selling to us, sell right through us to the same people we want to sell to.

Mr. LINCOLN: What do you consider reasonable average profit for the handling of your grain?

Mr. POWELL: One cent a bushel.

Mr. LINCOLN: In that are your expenses and interest and office expenses, and such things as that?

Mr. POWELL: Yes, sir.

Mr. LINCOLN: So that in paying out the elevation charge, that comes out of the profit, does it not?

Mr. POWELL: No, nothing comes out of that. A cent a bushel I consider a fair net profit out of which to pay the office and incidental expenses, for running the business.

Mr. LINCOLN: Have you been buying in Nebraska recently?

Mr. POWELL: Not for about a month.

Mr. LINCOLN: Why not?

Mr. POWELL: The car situation has been so bad here that we have

more or less withdrawn from the market. Before that time we were what you would call regular bidders; we bid every day.

Mr. LINCOLN: Will you explain to the Commission how this elevation allowance made at the Missouri River affects you?

Mr. POWELL: The elevation allowance according to the testimony that has been brought out here—the elevator owner is made an allowance and the grain shipper who does not own an elevator gets free elevation. Now, either one of those people want to go out to that place we were speaking of, Friend, Nebraska, and buy a car of grain in competition with me, and he goes down to Mobile or Vicksburg or New Orleans to sell it in competition with me, he has just as much advantage as the elevation allowance or the free storage gives him.

214 Mr. LINCOLN: Mr. Powell, I believe you ship very largely to Cuba, do you not?

Mr. POWELL: Yes.

Mr. LINCOLN: Exporting, through Mobile, Alabama?

Mr. POWELL: Yes.

Mr. LINCOLN: And your rate from East St. Louis to Mobile is what?

Mr. POWELL: Our rate from East St. Louis to Mobile is 12 cents a hundred pounds on domestic business.

Mr. LINCOLN: On export business.

Mr. POWELL: On export business it is part of a through rate; we do not have rates from East St. Louis-

Mr. LINCOLN: Do you get an elevation allowance on that?

Mr. POWELL: No, no elevation allowance on export business.

Mr. LINCOLN: Do you do considerable business at Louisville, Kentucky?

Mr. POWELL: Yes.

Mr. LINCOLN: With grain dealers there?

Mr. POWELL: Yes.

Mr. LINCOLN: Do you get any allowance on that business?

Mr. POWELL: No; no allowance on that business.

Mr. LINCOLN: What competition do you find at Louisville and Cincinnati?

Mr. POWELL: The Missouri River dealers sell there very extensively?

Mr. LINCOLN: On your grain that you purchase in the west, going from Louisville and Cincinnati, then, you have to come into competition with the Missouri River dealers?

Mr. POWELL: Yes, sir.

Mr. LINCOLN: And the Missouri River dealers get an allowance of three quarters of a cent?

Mr. POWELL: Yes.

Mr. LINCOLN: Where as if you handle the same grain from the country point of origin to St. Louis and ship it to Louisville or to St. Louis, you get no allowance?

Mr. POWELL: No allowance at all.

215 Mr. LINCOLN: Is not three-quarters of a cent to a grain dealer a considerable allowance, and does it not cut quite a

figure in handling the business—such an allowance to a grain dealer or to an elevator?

Mr. POWELL: Yes, it practically pays the elevating expenses, the operating expenses.

Cross-examination:

Mr. PIERCE: When you say that there is an allowance made to Missouri River shippers and not to St. Louis shippers, you mean an allowance made by the lines west of St. Louis, between St. Louis and the point of origin?

Mr. POWELL: On the inbound movement.

Mr. Powell: On the inbound movement.

Mr. PIERCE: That is what you meant by no allowance being given?

Mr. POWELL: Yes.

Mr. PIERCE: Those are the lines you referred to?

Mr. POWELL: Yes, sir.

Mr. PIERCE: You spoke of a shipment going to New Orleans. What sort of a free service do you get there—from the car to the boat?

Mr. POWELL: No free service and no allowance at New Orleans.

Mr. PIERCE: Do they not transfer the grain to the boat for you at New Orleans.

Mr. POWELL: I don't know. I have never tried any-

Mr. PIERCE: You do not know what service is performed there?

Mr. POWELL: No, I do not know what the service is at New Orleans.

Mr. PIERCE: Speaking of this allowance, then, I want the record to show clearly that you are referring to allowances by railroads west of St. Louis and not any service or allowance east of St. Louis on outbound shipments.

Mr. POWELL: That is right.

Mr. CROSBY: You spoke of a difference in price at the Missouri River, the inference being that that difference was occasioned entirely by the elevation charge. How do you account for the
216 difference between Omaha and Kansas markets of a cent to a cent and a half a bushel?

Mr. POWELL: Market conditions. There are other conditions besides the elevator allowance which have an effect on prices.

Mr. CROSBY: The same thing would be true as to the market in St. Louis, as compared with Kansas City? They are very often entirely out of line on freight rates?

Mr. POWELL: Yes, there are other conditions which affect the prices.

Commissioner PROUTY: What is the principal market of the St. Louis grain dealer?

Mr. POWELL: Which St. Louis serves?

Commissioner PROUTY: Yes.

Mr. POWELL: St. Louis distributes grain to the southeast the Mississippi Valley, exports a considerable quantity of grain to Cuba,

and at times sells a good deal of grain to the southwest, principally to Texas.

Commissioner PROUTY: Is there a considerable quantity of grain handled here at St. Louis?

Mr. POWELL: Yes, sir.

Commissioner PROUTY: What is your elevator capacity?

Mr. POWELL: I do not know what our elevating capacity is exactly, but I think Mr. Lincoln has it here. He brought it up here in the Merchant's Exchange book.

Commissioner PROUTY: You say the elevation charge here is one-half of one cent a bushel, including ten days' free storage?

Mr. POWELL: Yes, sir.

Commissioner PROUTY: Does that include anything except the elevation—cleaning or clipping-

Mr. POWELL: No, just the transfer of the grain and ten days' free storage in the elevator.

See pages 119 to 129, inclusive, original record.

217 M. W. COCHRANE, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows:

Mr. LINCOLN: Please state your name and firm.

Mr. COCHRANE: M. W. Cochrane; the Cochrane Grain Company of St. Louis.

Mr. LINCOLN: You are engaged in the buying and shipping of grain at St. Louis?

Mr. COCHRANE: Yes, sir.

Mr. LINCOLN: You are attempting to buy grain in Kansas and Nebraska and Iowa?

Mr. COCHRANE: Yes, sir.

Mr. LINCOLN: You make a special effort to buy grain in Nebraska, I believe.

Mr. COCHRANE: Nebraska, especially, yes, sir.

Mr. LINCOLN: You also sell grain very largely to Cincinnati and Louisville, do you not?

Mr. COCHRANE: We sell possibly three-fourths of the grain that we handle in those markets—that is the grain we ship.

Mr. LINCOLN: Do you receive any elevation allowance upon that grain which you send to Louisville and Cincinnati?

Mr. COCHRANE: No, sir.

Mr. LINCOLN: Do you at Louisville and Cincinnati meet competition with Omaha grain buyers, Missouri River grain buyers?

Mr. COCHRANE: We come in competition with them.

Mr. LINCOLN: Is that the strongest competition you have?

Mr. COCHRANE: That is the strongest competition we have, yes, sir.

Mr. LINCOLN: You, in the purchase of your grain undertake to get the virgin grain from the farmers' hands do you not, by purchasing at country stations?

Mr. COCHRANE: Yes, sir; we aim to purchase from the country grain dealers; that is, we will not buy grain in Omaha or we do not

buy grain in Omaha, as a rule, but sometimes we will buy a
218 little—very little, though.

Mr. LINCOLN: You prefer to have the virgin grain?

Mr. COCHRANE: Yes, it is much better.

Mr. LINCOLN: And you handle that grain through elevators at this point?

Mr. COCHRANE: Yes, sir.

Mr. LINCOLN: I presume you try to buy grain at Friend, Nebraska?

Mr. COCHRANE: We get quite a little grain at Friend, yes, sir.

Mr. LINCOLN: The rate on corn from Friend, Nebraska, to Omaha, Nebraska, is 8½ cents per hundred pounds. The rate from Friend, Nebraska, to Louisville, Kentucky, is 14½ cents per hundred pounds; making the through rate to the Omaha shipper 22½ cents per hundred pounds. The rate from Friend, Nebraska, to St. Louis, Missouri, is 16½ cents per hundred pounds, and from St. Louis to Louisville it is 6 cents per hundred, or the through rate of 22½ cents per hundred pounds.

The Omaha man selling grain to Louisville—you say you meet the Omaha competition and Missouri River competition, and I am using Omaha simply to illustrate this question--in purchasing grain from Friend, Nebraska, where you are also bidding, paying 22½ cents a hundred, in what way has the Omaha man an advantage over you?

Mr. COCHRANE: On account of the elevation of three-quarters of a cent allowed in Omaha.

Mr. LINCOLN: Why does that give him an advantage?

Mr. COCHRANE: It gives him this advantage. We have to handle the grain through the elevators here, and it costs one-half a cent a bushel, and that elevation they get. We have to pay here out of your own pocket the elevation they get, and that elevation that they get practically pays it, and it gives them that advantage over us.

Commissioner PROUTY: Is most of the grain here handled through public elevators?

Mr. COCHRANE: Yes, sir.

Mr. LINCOLN: Have you anything further to say on that
219 subject to the effect of the elevation at the Missouri River on the St. Louis market or on you in trying to secure business in Nebraska? If so, state it in your own way, please.

Mr. COCHRANE: Well, last year we shipped to Louisville, Kentucky, alone, I believe, in the neighborhood of 2,000 cars of corn. This elevation at that time was not in effect, and the chances are, that we can, if we can meet Omaha competition, sell fully as much grain there this year as we did last year, or more because the distillery interest we represent here and sell to has informed us that they expect to double their capacity, and of course with this elevation in up there now it is a question whether we will be able to get in there at all, and be able to beat that.

Mr. LINCOLN: What would you consider a fair average profit in handling grain?

Mr. COCHRANE: Well, we aim to clear one cent a bushel.

Mr. LINCOLN: Over and above your expenses?

Mr. COCHRANE: Over and above our expenses. We usually aim to clear about a cent, but to meet this Omaha competition I think we will be lucky if we clear one-half a cent.

Mr. LINCOLN: Then the three-quarters of a cent elevation allowance simply goes to reducing your profits to that extent, the extent it enters into the rate?

Mr. COCHRANE: We would consider it would pay the elevator for handling it here, which we now pay out of our pocket, so to speak.

See pages 129 to 134 inclusive, original record.

220 EXHIBIT 2.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & Co. et al., Complainants,
vs.
UNION PACIFIC RAILROAD COMPANY et al., Defendants.

Affidavit of C. J. Lane.

STATE OF NEBRASKA,
County of Douglas, ss:

C. J. Lane, being first duly sworn on his oath says that he is the First Assistant General Freight Agent of Union Pacific Railroad Company and that he is familiar with the originals of the exhibits attached to the Cross-Bill of Union Pacific Railroad Company, filed in the above entitled case; that he has examined the said exhibits attached to the said cross-bill and compared them with the originals and that the same are correct copies of such originals.

Affiant further says that he is familiar with the litigation pending in various courts involving the so-called elevator allowances under the contracts with F. H. Peavey and Trans-Mississippi Grain Company, and that the allegations as stated in paragraphs 40, 41, 42, 43, 46, 47, 48 and 49 of the aforesaid cross-bill are true.

Affiant further says that as stated and alleged in paragraph 50 of the said cross-bill, many elevators and mills located in Kansas and Nebraska assert and claim that they have, during the time covered by the aforesaid Peavey contract, performed identically the same service as that perfomed by the elevators owned or controlled by F. H. Peavey & Company, and that the proprietors and owners of
the said elevators and mills threaten to bring suits against the
221 Union Pacific Railroad Company for the recovery of elevation allowances on the grain so handled, and that the said claims amount, in the aggregate, to many thousands of dollars.

Affiant further says that he is familiar with the business of elevators and the railroads delivering grain thereto, and taking grain therefrom, and that he believes if there were no elevator allowances provided for or made or paid by the railroad companies, elevator owners would, in the natural course of the grain business, unload and elevate their grain at their own expense and without cost to the railroad companies. And further affiant says not.

C. J. LANE.

Subscribed in my presence and sworn to before me on this 17 day of November, 1909.

[SEAL.]

H. E. KELLY,
Notary Public.

222 Afterwards, to wit, on the 20th day of November, 1909, a Stipulation was filed. Said Stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

F. H. PEAVEY & COMPANY ET AL., complainants,
v.
UNION PACIFIC RAILROAD COMPANY et al., defendants.

In equity, No. 3405.

STIPULATION.

It is hereby agreed that the above-entitled cause may be tried upon the following evidence:

1. The evidence heretofore taken in the proceedings before the Interstate Commerce Commission referred to in the bill of complaint and answer in this case and in case No. 3437, an abstract of which is herewith submitted signed by counsel for the parties, and marked "Exhibit 1." But it is understood that either party may have printed and present to the court the testimony, in part or in full, of any witness or witnesses who testified in said proceedings before said Commission.

2. A copy of the written contract for the construction of the Council Bluffs elevator which was entered into by and between Frank H. Peavey and the Union Pacific Railroad Company, the same being attached hereto and marked "Exhibit 2."

3. The orders and opinions of the Interstate Commerce Commission, copies of which will be found in defendant's answer to the bill of complaint in case No. 3437.

4. The following statement of Frank T. Heffelfinger, it being agreed that he would, if recalled, testify as follows: When the order of June 29, 1908, was entered, complainants demanded of the Union Pacific that it carry out and comply with its contract and bring a suit to annul and set aside the order of the Commission. This it declined to do, but finally agreed, with the consent of the Commission, to, and did, amend its published tariff and schedule so far as to provide for its continuation for time being, but to prohibit any payment being made thereunder unless and until a court should determine there was a liability, but did not agree to continue the publication for any definite time. The Commission consented to the filing of this amendment provided it could have an opportunity to be heard in any proceeding to question its orders. Since the 1st of May, 1908, and since the promulgation and taking effect of the order aforesaid of June 29, 1908, and up to the 1st day of October, 1908, the Omaha and Midland companies have performed for the Union Pacific the elevation and transfer services aforesaid to the extent and in the amounts set forth in the itemized accounts attached to the bill as Exhibits 6 and 7. Demand was made of the Union Pacific for the payment of said bills, but payment was refused.

Like bills have since been daily and constantly accruing, but have not been paid.

5. Subject to the right of either party to show any tariff to the contrary, it is understood that the rates of transportation exacted and collected by the Union Pacific Railroad Company for the transportation of grain from points of origin west of the Missouri River to points on that river are the same in each instance, whether the final destination of the grain is some point on the river or some point east thereof—that is to say, where no elevation allowance is paid the total charge for transportation paid by the shipper is the same as where an elevation allowance is paid.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

EXHIBIT I, PART I.

ABSTRACT OF TESTIMONY

BEFORE THE

INTERSTATE COMMERCE COMMISSION

IN THE MATTER OF

ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Hearings at Chicago, Ill., on June 25, 26, and 27, 1903, September 17 and 18, 1906, and October 1, 2, 3, 4, and 5, 1906.

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TESTIMONY BEFORE THE INTERSTATE COMMERCE COMMISSION, VOL. I, JUNE 25, 1903.

J. A. MUNROE, freight traffic manager, Union Pacific, connected with traffic department for twenty years:

15 The Union Pacific system serves the States of Kansas, Nebraska, Colorado, Wyoming, and Utah. The eastern termini are Council Bluffs and Kansas City, Mo. In Kansas, competitors are the Atchison, Topeka & Santa Fe; Chicago, Rock Island & Pacific; Missouri Pacific, and Chicago, Burlington & Quincy, and Frisco and Missouri, Kansas & Texas to a limited extent. In Nebraska the competitors are the Burlington; Rock Island, and the Nebraska division of Chicago & Northwestern, and to a lim-
17 ited extent the Chicago, St. Paul, Minneapolis & Omaha, and also St. Joseph & Grand Island. The North Western, Burlington, and Rock Island go through Omaha and Council Bluffs to Chicago, having through lines from the West. Santa Fe and Rock Island go through Kansas City to Chicago. Union Pacific is the only line serving Kansas not having eastern lines.

19 Peavey & Company operate grain business in Minnesota, North Dakota, South Dakota, Nebraska, Kansas, and Wisconsin. The contract with Peavey & Company for elevation was made in 1899, exclusively and primarily as a bona fide relief in the question of cars. Union Pacific has limited equipment for through traffic. Equipment consists of about 8,000 box cars, and grain must be loaded in box cars. Union Pacific has had bitter experience in the past allowing their equipment to go to eastern destinations without transfer. Must have ample elevator facilities at eastern terminals of Union Pacific in order to get fair use of equipment and regularly serve patrons. Therefore, Union Pacific called upon Mr. Peavey looking to the putting up at Council Bluffs of an elevator of not less than 1,500,000 bushels capacity. Had some experience with shovel transfer and elevated tracks, but demonstrated no modern facility known to take place of elevator. Services were worth all the Union Pacific had to pay for them, viz, 1¼ cents per hundredweight,
23 and have resulted in far better use of equipment. Contract has never had any effect on the grain producers in the interior, nor has there been higher prices paid to the grower by reason of the contract; nor has it ever given Peavey & Company any undue advantage over any shipper or any other party in the information

of the witness, and he has never heard any complaint from anyone doing business along the lines of the Union Pacific that the con-
24 tract was prejudicial. Has given foregoing matters most careful attention. The Union Pacific has announced that it was ready to allow the same transfer charge to any corporation or individual who will erect a modern elevator of the same size as the Peavey elevator either at Council Bluffs or Kansas City. The size of the elevator at Council Bluffs is 1,500,000 bushels and at Kansas City 1,000,000 bushels.

The elevator was built at the instance of the Union Pacific. "We sought Peavey; he did not seek us."

25 Grain produced in Kansas and Nebraska is marketed mostly in the East, and through rates obtain from Kansas and Nebraska points to the East. The effect of the elevators is to permit the unloading of the grain transported by the Union Pacific, the storing for such time as commercial conditions may demand, and the reshipment of the grain to the Mississippi River and East, the same through rate being protected from points of origin as would obtain had this grain moved without transfer. But for the elevators the cars of the Union Pacific would, during the three or four months in which this commodity is transported, all move into foreign territory, and it would result in a car famine on the lines of the
28 Union Pacific. There is another elevator at Council Bluffs known as Trans-Mississippi Company, the ownership of which is in the Union Elevator Company, which is composed of six equal parts among six lines running from Council Bluffs east, including the Union Pacific running west. This elevator is operated by the Trans-Mississippi Grain Company, and the same rates apply as with the Peavey Elevator. Although there is no regular written contract with the Midland Elevator Company at Kansas City, there is an understanding or implied contract for the same charge and arrangement as at Council Bluffs. The Midland Elevator at Kansas City is owned by the Peavey interests.

30 The competitors of the Union Pacific having rails east of Council Bluffs and Kansas City, and naturally wishing to have the longest haul possible for their own road, haul their grain to their terminals which are farthest, while the Union Pacific, whose lines terminate at Council Bluffs and Kansas City, not wishing to allow their cars to go east, transfer their grain at those points, and it is absolutely necessary to have elevators for this transfer. Grain facilities are absolutely necessary for conduct of a large grain business at a large grain center. Elevator facilities are absolutely necessary for the proper handling by the Union Pacific of any large volume
33 of grain. The Union Pacific has had experience in owning elevator, but finds it most satisfactory to hire the elevation. The shovel transfer is absolutely impracticable, and the elevator transfer

is the best method known. The charge of 1¼ cents per hundredweight is, in the opinion of the witness, reasonable compensation for the services rendered. The Union Pacific is the only line that permits the protection of the through rate through elevators on grain from the west, and therefore the elevator at Council Bluffs would handle only the grain of the Union Pacific.

35 The Chicago Great Western on the north handle their grain by way of Blair, Nebr., the Burlington on the south by way of Plattsmouth and the Rock Island direct. The grain in the Peavey elevators at Council Bluffs goes east by the Burlington, Rock Island, North-Western, the St. Paul, and the Illinois Central. When the grain is delivered to the Peavey elevator it passes out of the hands of the Union Pacific and the transaction as far as that road is concerned is practically closed. Eastern roads who are parties to the tariffs of the Union Pacific take the grain from the elevator for transportation east. The charge is exclusively paid by the Union

39 Pacific as a car-release question. The contract with Peavey & Company allows the railroad forty-eight hours free storage. It is absolutely necessary for the economical and reasonable handling of the grain business of the Union Pacific to have a grain elevator at Council Bluffs. If it did not build it would have to have some one else to do so.

44 Peavey & Company own practically all the grain that goes through their elevator. They operate some 70 houses on the Union Pacific in Nebraska and 50 in Kansas. They buy the grain in the interior and ship it. Peavey & Company do not own all the grain that passes over the Union Pacific. Grain is

45 consigned through from the initial point. It is billed in at the Union Pacific's local rate and the Union Pacific collect the local rate when the car is unloaded, or at stated periods. When grain goes out, the Union Pacific's western expense bill is surrendered to the eastern line, where it is verified and stamped. This stamp becomes the authority for the eastern line to accept their proportion of the through rate east of Council Bluffs. The proportion of the through rate which comes to the Union Pacific and the local rate to Council Bluffs are the same. Quite a little of our grain goes through without transfer.

41 Has been no occasion for Union Pacific to use storage beyond the forty-eight hours. We have utilized foreign cars homeward bound in connection with other business so far to bring about the relief. The independent buyers must have a car that

50 goes through without transfer at Council Bluffs, and a reasonable amount of cars are furnished them, a pro rata amount. The elevator can be used by the railroad company for the transfer of grain of the independent buyer if the railroad company so elect, but very little, if any, grain of independent buyers goes through the ele-

vators. There is no elevator charge at Chicago similar to the charge at Council Bluffs. On cars that go through without transfer the Union Pacific pays no elevator charge.

Commissioner CLEMENTS. What proportion of the grain that moves is shipped by independent operators?

Mr. MUNROE. I can not tell you exactly, but I shall be glad to furnish that. I would say perhaps it varies from 30 to 40 per cent. Most of the grain is handled by the elevators by reason of the large number of houses they have in the interior. On grain of independent shippers if a through car could not be furnished and the grain had to be transferred at Council Bluffs or Kansas City, the Union Pacific would bear the expense of the transfer, so the independent shipper has the benefit of exactly the same through rate as Peavey. The shipper specifies the routing; if he calls for Wabash equipment, the Union Pacific gets that if possible. No allowance is paid by Union Pacific anywhere on its lines, except Council Bluffs and Kansas City. Independent shippers have elevators at Kansas City.

Complaints come from grain men operating on other lines, who demand from other roads what they call terms as good as Peavey receives from the Union Pacific, overlooking the fact that the Union Pacific has to purchase transfer facilities.

The grain of Peavey & Company is elevated at Kansas City at the Midland elevator, other grain at other elevators. The Union Pacific pays for the elevation at the Midland, but does not at the other elevators.

The Santa Fe brings grain to Chicago which goes east on other roads and when that grain is transferred the eastern roads are making transfer allowances to certain houses other than the regular houses, known as transfer houses, so there is no expense so far as the shipper and consignee are concerned.

The shovel method of transfer is used to some extent on the grain of independent shippers. Sometimes the Union Pacific allows its equipment to go east with grain shipments. All the grain that is elevated in the Union elevator at Council Bluffs goes to the roads operating lines east, and the routing is specified by the shippers. Each road gets a certain portion. For a certain period one carrier will get more than another. All lines east of Council Bluffs have access to the Peavey elevator. It is believed that the grain dealers on the Santa Fe get as high prices for their grain as the dealers on the Union Pacific. Peavey & Company does not pay any more for grain than anyone else. There are several competitors of Peavey and the Trans-Mississippi company. There are more houses in the interior belonging to other dealers than there are belonging to Peavey & Company.

83 The minimum cost of transfer by shovel is $1.75 per car, but the maximum cost, taking into consideration delay to equipment, would be $25 to $100. Given the tracks, the requisite number of men, and the cars, the shovel transfer would cost somewhat less than for the elevator transfer.

87 No allowance is made at milling in transit points for unloading cars and releasing equipment. Although there are other elevators at Kansas City in which grain is unloaded, no allowance is made by the Union Pacific to such elevators. The rate of the Union Pacific takes the grain into the Peavey house and returns the empty.

The modern elevator returns the empties in shortest possible time. In shovel transfer it is necessary to have doors of unloading and receiving cars exactly opposite. Have therefore to assign a special switch engine and crew. Have maximum of switching service with minimum result. When grain is moving, in the track or high ball transfer, have to rely on connecting line's car being ready. Do not with the elevator transfer.

At Chicago there are cases where one-fourth of a cent per bushel is paid. "On this independent grain, if we can bring about an economical measure and use shovel transfer, we do it at our expense. We make the best trade we can of the individual cars before us to-day." Have been enabled to either ship through or transfer independent grain without using the elevator of Peavey & Company. Forty-eight hours storage does not apply on Peavey & Company grain; that can remain as long as they choose.

Wheat moves from between the middle of July and the 1st of August and continues into the fall. Corn commences to move in December and continues until May or June.

Mr. F. T. HEFFELFINGER, Minneapolis, member of the firm of F. H. Peavey & Company, who are grain merchants and owners of elevator interests, which are distributed largely over the States

108 of the Mississippi Valley:

Have elevators at Duluth, Chicago, Minneapolis, Council Bluffs, and Kansas City, and about 450 country stations in the States of North Dakota, South Dakota, Minnesota, Iowa, Nebraska, and Kansas. The Union Pacific desired facilities at Council Bluffs and Mr. Peavey was asked to put up the elevator, which was constructed in the spring of 1899. The elevator was transferred to the Omaha Elevator Company, and since its completion has been operated by that company. A controlling interest in the stock of that company is owned by Peavey & Company. The elevator at Kansas City is operated by the Midland Elevator Company, and a controlling interest in the stock is owned by Peavey & Company. Elevators have been more or less under the personal supervision of wit-

ness. From the standpoint of the railroad company and as
114 incidental to the grain business, considers 1¼ cents per 100 pounds a fair allowance. There is no charge paid by other roads hauling the grain out of the elevators.

The following tables contain a statement of the cost of operation of the elevators at Kansas City and Council Bluffs, together with a statement of the bushels of grain handled.

Total bushels grain handled by Union Pacific elevator for Union Pacific Railway for five years.

July, 1898, to June, 1899		1,523,956
July, 1899, to June, 1900		2,333,251
July, 1900, to June, 1901		4,673,850
July, 1901, to June, 1902		2,677,883
July, 1902, to May, 1903		1,120,441
Total		12,329,381
Total transfer charge paid to elevator, July, 1898, to May, 1903		$92,069.63
General elevator expense	$45,343.00	
Taxes	4,918.00	
Building insurance	10,182.00	
Maintenance, repairs	17,047.00	
		77,500.00
Gain, five years		14,569.63
Average annual gain		2,913.92
Cost of elevator		150,000.00

NOTE.—No charge is made against elevator in above figures for insurance on grain in store awaiting shipment, interest on money invested in such grain, clerical work in office, general management or depreciation in value of plant, or interest on money invested in plant.

Total bushels grain handled by Peavey elevator, Council Bluffs, for four years.

July, 1899, to June, 1900		8,695,594
July, 1900, to June, 1901		5,991,712
July, 1901, to June, 1902		2,953,776
July, 1902, to May, 1903		6,198,451
Total		23,839,533
Total transfer charge paid to elevator, July, 1899, to June, 1903		$157,639.96
General elevator expense	$79,708.00	
Taxes	9,960.30	
Building insurance	14,800.00	
Maintenance, repairs	6,000.00	
		110,468.30
Profit		47,171.66
Average annual profit		11,792.91
Cost of elevator		200,000.00

NOTE.—No charge is made against elevator in above figures for insurance on grain in store awaiting shipment, interest on money invested in such grain, clerical work in office or general management, or depreciation in value of plant, or interest on money invested in plant.

116 The grain going into the elevator is owned by the Omaha Elevator Company. No other grain than that from the Union Pacific was handled through the elevator at Council Bluffs. Nothing was received for storage. About 60 per cent of the grain was corn, on which the allowance is 7 mills per bushel; 14 per cent oats, on which 4 mills was paid; 17 or 18 per cent wheat, on which the allowance was three-fourths of a cent, and the balance barley, on which six-tenths of a cent was paid.

119 About 3,000,000 bushels were handled at Kansas City, which is not included in the statement. The expense for handling that grain is deducted from the total expense in proportion to the amount handled, which is about sixty-three one-hundredths of a cent per bushel. The expense of running the elevator is in one account. Any profit accruing from the handling of grain—that is, an advantage in storing, mixing, and treating the grain—goes into the grain account. This profit can not be estimated. It would have been unprofitable to run a transfer elevator unless there was some profit accruing from grain business.

124 At the end of the fiscal year the elevator is practically cleaned out, while at other times in the fall it is filled and overflowing. No charge was made to the grain business by the elevator business for storage, etc. There is no other place where the railroad company pays an allowance for transferring grain; there is no place where the same conditions exist. There would be a storage charge for storing grain of anybody else, other than the forty-eight hours provided for in the contract on grain transferred for the Union Pacific. There is no storage of grain at Council Bluffs. The charge for storage at Kansas City is three-eighths of a cent for twenty days and three-fourths for thirty days per bushel. "It is our endeavor—being a transfer point and not a grain market—to obtain cars as fast as we can and to ship the grain out." Very little grain is shipped direct to New Orleans, New York, or Baltimore. Most of it goes to Chicago, some to St. Louis, Kansas City, Baltimore, and Minneapolis. If the grain went to an elevator company in Chicago and St. Louis, it would be elevated again. Peavey & Company sell very largely to other grain dealers at other grain markets.

The CHAIRMAN. Could you conduct your present business on the line of the Union Pacific road without an elevator at Council Bluffs?

Mr. HEFFELFINGER. Absolutely. They could ship the grain through to Chicago and have their facilities there. The elevator was built as an investment, and Peavey & Company are satisfied that it pays. If they were not grain men, they absolutely could not afford to build and maintain the elevator as a mere transfer proposition. Understands there are some 900 elevators in Nebraska and Peavey & Company have only 72. If they did not have the elevator at Council

Bluffs, the same aggregate amount of grain would be handled through the country houses and profits would be in the aggregate as large if not larger on the country end than they are now on the whole. The company, however, gets a large amount of storage at Council Bluffs, which in part remunerates them for the construction of the elevator. Are times when storage itself caused them actual loss; if could have shipped through it would have saved them money—insurance and tying up causes loss. As soon as the grain is mature it begins to move and is marketed in large quantities, which is usually a period when other merchandise is moving and consequently there are sometimes not enough cars to ship the grain. Storage in Omaha is not indispensable, as the company could build elevators in the country as they are doing.

It would probably not cost us over 4 or 5 cents a bushel for the storage. We could do it there if we found it advisable. Naturally, we would not do so, because the grain would be back in the farmers' hands, and we would be very foolish to pile up a lot of grain in the country on which there was an absolute loss. We had better let the farmers carry it. But furnishing this additional storage, we are able to handle the farmers' grain now when they want to move it. The farmer gets cash for it; otherwise he would be the loser, because he would have to carry it.

The quantity of grain handled through an elevator influences the expense. There are certain fixed charges which must be paid anyway, and over that is handled cheaper. The largest amount
145 that could be handled through the Omaha elevator is about 18,000,000, and at Kansas City 4,000,000 or 5,000,000. During one year there was a poor crop and no grain was put through the Kansas City elevator and only 294,000 went through the Omaha elevator. There was one time when a cent additional was paid to Peavey & Company, which was a differential against them, other dealers paying a through rate and that company being obliged to pay the sum of the locals. Insurance must be paid on grain in the elevator at Council Bluffs, which, if it was shipped
149 through to Chicago and sold to grain dealers there, would not have to be paid. By storing grain at Council Bluffs instead of shipping to Chicago the company in some cases gets the benefit of markets which could not be reached by storage in Chicago. Grain consigned east is transferred free of charge either by the delivering or receiving line in Chicago. The house in Chicago transferring grain from the entire Mississippi Valley fields would have more business and could transfer cheaper than the house at Omaha.
164 Peavey & Company transfer grain sometimes for customers in Chicago, and in no case would they be able to do it for less than one-half a cent a bushel. Have also transferred some at Minneapolis and Duluth on that basis. There are times when there is a profit in mixing, blending, and storing wheat and reaching other markets than Chicago. It is considered profitable to treat grain in

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the elevator if it can be improved as much as half a cent. There is very little opportunity to clean, mix, etc., corn and oats. The price to be paid for grain in Kansas and Nebraska is on the basis of the highest market. The grade of corn in markets is determined by inspectors appointed by law or by organizations looking after grain interests.

P. C. STOHR, general traffic manager Chicago Great Western Railway Co.: Has been with the company since 1389.

173 Chicago Great Western has elevator at Kansas City of about a million bushels capacity and one at St. Joseph of about 100,000 bushels capacity, both operated by the Chicago Great Western. Felt that could transfer grain from western cars to their cars more economically. Also by having the elevator at Kansas City have been able to load cars to the maximum capacity. The grain as it is loaded at the country point is shipped in cars of small capacity and the contents was formerly loaded into large cars. Were receiving some grain from elevators of other railroads in Kansas City.

176 It cost from $3 to $5 per car switching charge besides $1.75 per car for transferring grain. Grain as it comes in from the west is put in their elevator and then hauled out as cars are available, and no charge is made to the shipper for this transfer. In the last three years has hauled 22,000 cars of grain from the west in 20,000 of Chicago Great Western cars, thus saving 2,000 cars. There does not exist the same reason for the Santa Fe and Burlington to have an elevator as does for the Great Western and Union Pacific. The lines of the Great Western run north through Leavenworth, Kans., St. Joseph, Mo., and easterly to Chicago. There is also a line to Minneapolis and one almost completed to Omaha.

179 Cost of transferring grain in these elevators, not including taxes or management, is 1¼ cents per 100 pounds, including some storage for which a charge is made when it is stored to await a change in the market, but not when the grain is waiting for cars. The amount received from storage was deducted from the gross expense in the statement submitted. To have the services performed by an independent company would be willing to pay 1¼ cents per hundredweight. Interest on the investment was figured at 5 per cent.

In old days used to run the cars upon a track and employ laborers to shovel grain into their cars; found it impossible to double up cars—that is, load two light cars into one large car. Had to set cars door to door, and have shifting engine to move up and down the track. The shovel transfer was found impracticable and utterly inadequate. The elevator is managed as economically as possible.

Q. If it costs you 1¼ cents to do this business, how do you account for the fact that railroad lines in Chicago going east can get that same service performed by elevator companies for one-fourth of a cent per bushel, and in Kansas City, too?—A. That depends on who owns the elevator. If the railroad company owns it and leases it to the elevator man, it is possible that the grain dealer may be getting compensation from some other source.

Grain comes in on the various roads, and if a shipper orders it out via the Great Western it is turned over to the elevator and unloaded. No switching charge is paid by the Great Western in Kansas City. The Santa Fe makes an extra charge for this switching to the shipper, and the Missouri supreme court has held that this charge is proper. The eastern roads pay the transfer charge.

W. B. BIDDLE, freight traffic manager Atchison, Topeka & Santa Fe Railway Company:

Has been in the freight service of the company about twenty-three years.

197 Cost of shovel transfer on the Santa Fe varies from $1.40 to $1.75 per car. Did at one time contract with other parties for transfer at $1.25. Is only done where adequate facilities in more desirable form are not available. A very small proportion of the grain that is brought into Kansas City by the Santa Fe goes east over their line to Chicago, because it is put on the market at Kansas City and is open to the competition of all buyers and all roads that reach from Kansas City.

It is as necessary for the Santa Fe to have prompt release of its equipment as it is for the Union Pacific. There are elevators on the line of Santa Fe at Argentine and at other interior points in

201 Kansas which do the same service as those of Peavey & Company at Kansas City. No charge is paid to any of these interior elevators for the performance of similar services. The allowance, if made at Kansas City, should be made at the interior points, and if the contract of Peavey & Company is permitted to stand the Santa Fe will have to make the allowance to Atchison, Topeka, and Winfield, because they perform the same service.

A small percentage of the grain going over the Santa Fe goes through to Chicago, because most of it is for export and the Gulf ports are the natural outlet. On the Santa Fe Richardson & Company lease the Santa Fe elevator at Argentine and one interior elevator. Aside from that the business in the country is done by individual buyers. Some of these operate 30 or 40 elevators with no connection with Richardson & Company except to sell them their grain.

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203 The Santa Fe pays for transfer at Argentine from car to car $2 a car of 40,000, 50,000, or 60,000 pounds. If the grain is loaded in a Santa Fe car, it goes through without transfer. Has been told that eastern lines at Chicago allow elevators one-quarter of a cent per 100 pounds for transferring. Cars to the Missouri River contain from 800 to 1,200 bushels; east of the Missouri and Kansas City somewhat less. Santa Fe, Rock Island, Burlington, and Missouri Pacific make no charge at Kansas City for switching when grain which comes in over their lines goes forward over the same line, but make charge when the grain in sent via another line. A large portion of the grain which comes to Kansas City over
216 the Santa Fe goes east over other lines. Most of the grain over the Santa Fe is billed to Kansas City.

208 Our interest in this matter has been to get at just what the conditions were and what was a reasonable charge to pay for a service which it was admitted we had to have performed. Is an advantage to have equipment released at Kansas City. Has
213 not denied that there was a necessity for the Union Pacific having an elevator at Kansas City.

The contract of the Union Pacific with Peavey & Company only affects the Santa Fe in that the grain dealers who transfer their grain demand the same conditions as are given to Peavey & Company. Has never heard of any complaint of difference in prices of grain on Union Pacific.

217 Would be justified in paying anything we had to, whether it was $2 or 1¼ cents per hundredweight, or $5 or $10 per car, to secure prompt release of equipment. No complaint because this charge reflects back into country or that it is illegal,
221 but because if it continues Santa Fe may have to adopt same practice, and it is excessive. Richardson & Company transfer grain of the Santa Fe at Galveston and are allowed 1 cent a bushel. This allowance is one-fourth of a cent more than the Peavey allowance at Omaha, but is forced upon the Santa Fe by an allowance of 2 cents a hundred at New Orleans by all railroad companies.

Mr. BALDWIN. Do you say as traffic manager of the Santa Fe that there was no necessity for the Union Pacific in the economical handling of its business to have these elevators, to own and operate them themselves, or to have it done by others?

Mr. BIDDLE. Absolutely necessary.

The CHAIRMAN. And equally necessary for the Santa Fe to have similar facilities at Kansas City?

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. So that it simply comes to this—that you regard the allowance made under this contract to Peavey & Company as excessive?

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Mr. BIDDLE. We have thought so, based on what we had to pay and what we knew others were paying for similar service.

The CHAIRMAN. The service must be afforded in the practical handling of the business.

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. And those who furnish the service must be paid reasonable compensation?

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. So far as you know, from your knowledge of the situation, with respect to the grain business, is it likewise important for the Burlington to have elevator facilities at the Missouri River?

Mr. BIDDLE. I so regard it.

The CHAIRMAN. How about the Rock Island?

Mr. BIDDLE. I should say that they were in exactly the same situation, and the Missouri Pacific.

W. C. STITH, freight traffic manager Missouri Pacific Railway Company:

Connected with the company for about twenty-five years.

237 Lines of the Missouri Pacific so far as grain-producing territory and markets are concerned are identical with those of the Santa Fe. "We are of the belief that the old method of shovel transfer of grain is inadequate to our needs, and that the exigencies of the business require some facility that will meet our demands and relieve our yards of the congestion that invariably follows an attempt to use exclusively shovel methods." "We have been unable to get elevator transfer service performed at Kansas City for any much less sum than the amount set forth in the contract of 1¼ cents per hundred pounds." Most of the grain which enters Kansas City is consigned to Kansas City. Transfer facilities at Kansas City are absolutely essential to prompt movement of business, to release of cars, and consolidation of loads. Are arranging to build a large elevator of about 1,000,000 bushels capacity. Have an elevator at Leavenworth and at Coffeyville. One at Leavenworth is leased to Denton Brothers for $5,000 a year. The one at Coffeyville is leased to Hall & Robinson at $300 a month. Did transfer through Merchants' elevator at Kansas City; thinks they paid 1¼ cents. This elevator was destroyed. After that transferred some by shovel at a cost of $1.75 to $2.50, but was continually in hot water regarding labor and the setting of cars, which was unsatisfactory. Found shovel transfer was in reality more expensive than elevator service because of detention of cars. Thinks the elevator at Kansas City was to be leased. The payment to the Merchants' elevator was for the transfer from foreign cars to Missouri Pacific cars that were to go over the Missouri Pacific. The transfer at Coffeyville is for the purpose of consolidating the load. No allowance at all is made at Coffeyville. Situation

of the Santa Fe at Kansas City, where grain is delivered to the Missouri Pacific, is identical with the situation of the Union Pa-
254 cific. Thinks charge at St. Louis is less than one-half of a cent a bushel. Missouri Pacific, like Santa Fe, has lines south and east of Kansas City. Missouri Pacific does not get a very large portion of the grain going east.

Hall & Robinson do a large part of the business over the Missouri Pacific and they are exporters through Galveston.

257 The lines which bring grain into Kansas City from the west are Santa Fe, Rock Island, Union Pacific, Missouri Pacific, Frisco System, St. Joe & Grand Island, Burlington, Kansas City Southern, Missouri, Kansas & Texas, and about the same number running to the East. Lines running east which have no rails west of the river are Alton, Wabash, Chicago, Milwaukee & St. Paul, and Chicago Great Western. The grain is divided among them and the eastern divisions of the through lines. There is a reconsignment charge on the Missouri Pacific for cars which go over other lines after coming in on the Missouri Pacific, and a refund is made if the same amount is shipped over the Missouri Pacific. The charge is $2. The Missouri Pacific takes some grain from the Missouri River, Omaha, and carries it through Kansas City to St. Louis. The rate from Omaha to St. Louis is less than the sum of the locals into Kansas City and to St. Louis.

H. GOWER, assistant freight traffic manager Rock Island System:

266 Rock Island pays for shovel transfer at Kansas City and St. Joe $1.75. Very little transferring is done by shovel. At Kansas City transfer through elevators is $2 for cars under 50,000; $2.25 for cars 50,000 to 60,000; and $2.50 for cars 60,000 and over. At St. Joe transfer is made for $2 per car regardless of weight. The Rock Island found they could not operate elevators satisfactorily themselves. Contract at St. Joe runs for five years. At Kansas City arrangement has been in force for two or three years. Storage capacity of elevators at Kansas City is 6,320,000 bushels, the han-
dling capacity 1,518,000. An elevator can not handle its
270 entire storage capacity. Certain parts are reserved for handling, mixing, etc. Has always understood the mixing, blending, etc., to be a valuable part of the elevator service which a private owner makes out of his elevator in handling his own grain that comes in. His information is that by judicious mixing of two different grades of grain the combination will come out at an increased value of a half a cent or more. It is desirable to avoid all transfers possible in the movement of grain from point of origin to destination from the standpoint of the railroads. The Burlington, Rock Island, Santa

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Fe, and Missouri Pacific as to grain which they bring into
271 Kansas City and which is there open to competition for transfer eastward stand on the same footing as the Union Pacific.
273 Parties have agreed to put up a million-bushel elevator and handle the grain of the Rock Island for 1¼ cents per hundred, the same price as is paid Peavey & Company. These parties convey the idea that as they must compete with the Midland elevator they must have the same allowance. This proposition has been declined. If the allowance to Peavey is permitted to stand it is probable other carriers will have to make the same allowance. At Peoria the charge for transferring wheat is $3 and corn $2.50. Is of the opinion that no allowance should be made to shipper, but that transferring should be done by receiving line.

The Rock Island owns the elevator at Kansas City, but the elevator is an old one and the facilities are not adequate and more elevator capacity is desired, but a new firm will not come in under the present conditions and put up a modern elevator unless they are assured that they will be on absolutely the same basis as their competitors.

The proposition was for an allowance of 1½ cents instead of
284 1¼. Knows of no instance where transfer service is rendered by other than a grain buyer. Rock Island owns an elevator at Horton, Kans., and have an interest in one at Topeka and two elevators at Chicago.

Shovel system is totally inadequate and wholly unsatisfactory.

Mr. BALDWIN. So at terminal points it is absolutely and indispensably necessary to the economical handling of the grain business of railroads to have an elevator?

Mr. GOWER. I think so.

If the service is exclusively for the benefit of the railway a reasonable charge should be made therefor. At Chicago
293 no charge is paid for transferring grain going east. Conditions at Chicago, as far as the transfer proposition is concerned, are the same as at Council Bluffs and Kansas City. Were a strong buyer to own an elevator at Kansas City, the interests of the Rock Island would be better looked out for.

The owner of grain in addition to having his grain unloaded has the benefit of having the grain go through the elevator, mixing, blending, and sending it out at a higher grade. Ninety per cent of the grain carried by the Rock Island is billed only to Kansas City. Rock Island carries east about 25 per cent of the grain it brings into Kansas City. About 50 per cent of grain brought in by the Rock Island goes south over their lines. No allowance is made by the Rock Island for elevation at Chicago. The Rock Island
305 leases two elevators at Chicago to Counselman for $12,000 a year. Character of complaints against Union Pacific

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allowance such that attach no importance to them. Does not know whether Rock Island has lost any business on account of payment made under Peavey contract.

J. F. TUCKER, chairman of the Central Freight Association:

Understands that for the transfer of grain through elevators the charge at Chicago is one-fourth of a cent per bushel. Where grain is owned by an individual and goes into the elevator of that individual to be handled either by mixing, blending, grading, or shipping out in any sort of way, if it is on the through rate and transferred, one-fourth of a cent is the allowance. If it is not consigned on a through rate there is no allowance.

The members of the association are Michigan Central, Lake Shore, Pennsylvania, Baltimore & Ohio, Big Four, Erie, Grand Trunk, and all get grain transferred at Chicago for one-fourth of a cent per bushel, as the witness understands it. Practically all the grain that goes east goes on the balance of the through rate, and therefore has this allowance. The allowance is not paid to public elevators, who handle the grain of the public.

G. H. CROSBY, assistant freight traffic manager of the Burlington road:

Shovel transfer formerly cost $1.25, and in later years $1.50 to $1.75. On grain hauled into Kansas City it is a terminal proposition for the Burlington just as it is for the Union Pacific. It is put into the market for competition by the eastern lines. A very small proportion of the grain hauled into Kansas City by the Burlington is hauled out by them. Burlington makes allowance of 1 cent per 100 at Burlington, Iowa, for unloading and transferring. A contract has been made by the Burlington with Harroun Brothers Grain Company to erect a million-bushel elevator and transfer such grain as the Burlington may wish transferred for $1.75 per car with the understanding that if anyone will do it cheaper they will reduce their price. This allowance is not made on grain that the Harroun Company want transferred. This is regardless of the weight of the car. But for grain owned by them to be unloaded into their own elevator to handle at their own convenience no allowance is made. It is the understanding of the witness that one of the inducements to build grain elevators for the purpose of transferring grain is the profit and advantage they receive from mixing different kinds of grain as it goes through and bringing out a product that is more valuable as a whole than the individual products. Witness thinks, however, that if the contract of the Union Pacific with Peavey is maintained, it will be necessary for the Burlington to make the same allowance to Harroun Brothers. In fact, there is an understanding that if that contract is main-

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tained the Burlington will have to meet the allowance made to Peavey. Having central elevators is an advantage to firms having line houses in the country, as the buyers may buy poor grain which, if mixed with other grain, would be more valuable. There is also an advantage in stopping the grain at Kansas City and Council Bluffs in that it could be held and shipped to Minneapolis and southern markets easier than from Chicago. Regards the practice of allowing grain owners allowances for unloading grain into their elevators where it can be mixed, blended, etc., as bad practice, as more to his advantage than to the railroads. One cent is allowed at Burlington because the rate of $1.75 can not be obtained there. The
338 arrangement at Burlington of paying 1 cent was the result of competition with Council Bluffs and also because it was necessary in order to get the service performed. Eastern connections will allow cars to go to Burlington when they will not allow them to go to the Missouri River, so the Burlington have their cars released at Burlington. There are no other elevators at Burlington, and it is impossible for the Burlington to get the grain transferred for less than 1 cent per 100. Finds it to advantage in handling equipment to transfer grain at Burlington. Can not operate elevator profitably. "As I have attempted to explain, on this transfer business, most of those houses were built for other purposes."

Commissioner PROUTY. If you need an elevator to transfer grain at that point and can not profitably build one yourself and operate it, why do you say you are forced to pay a cent a hundred by competition?

Mr. CROSBY. Other people are paying a cent or more and that creates a condition as to rates, whether it is high or low; the rate is a certain figure, and if anybody pays an allowance from that figure the net rate is different.

345 Where transfer takes place it is necessary to have some modern method of doing it. Shovel method is not practicable for large amount of business.

Commissioner PROUTY. Your trouble with this business seems to be that you pay the grain man who owns the grain?

Mr. CROSBY. The parties who are engaged in the grain business are also engaged in the elevator business. * * *

Commissioner PROUTY. If you pay them an elevator charge, that gives them an advantage so they can pay so much more—that is to say, by making these allowances it gives them the privilege of paying more on your line?

Mr. CROSBY. The man who has facilities on our line. We do not pay other people because it costs us money to get it of other people.

Mr. LATHROP. The service in running that grain out of the
358 car and through the elevator and into another car does not consist solely of just the transfer alone?

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Mr. CROSBY. No, sir.

M. LATHROP. There is the service of mixing, blending, grading, clipping, etc.?

Mr. CROSBY. Oh, yes; that is not for the benefit of the carrier. A firm could not afford to build an elevator for transfer purposes alone on the present allowance.

Mr. HEFFELFINGER (recalled):

364 Peavey & Company buy practically no grain from Burlington tracks, but this is not because they have no transfer allowance. Peavey & Company buy grain on the Rock Island and send it to Chicago because it goes to Chicago without expense to them. Would build elevators on the Burlington if they could get desirable locations. Have built more on the Union Pacific because it is more advantageous to handle grain over one line than over many. The fact that all the business of one grain dealer is on one road has nothing to do with the elevator transfer. Peavey & Company have elevators on the Great Northern and Northern Pacific. If it were not for the elevator at Council Bluffs, Peavey & Company could do their business just as well at Chicago, but would not have as many markets to reach. Cars of other carriers east of the river when loaded by Peavey & Company are transferred to the elevator at Kansas City or Council Bluffs. It makes no difference to the Union Pacific what the initial is; they use all cars of other companies on their lines.

377 Mr. HEFFELFINGER. * * * I presume any road would be glad to use the equipment of any other road in times when they were in need.

Mr. LATHROP. If that is so and if they have the power to do it, the fact that you stop it and run it through the elevator is not because these foreign carriers would not take out the cars that came in, but simply in order that you may get the cent and a quarter?

Mr. HEFFELFINGER. Most assuredly; if we could not get the cent and a quarter on grain we handle, where would we be? What kind of business men would you take us to be, to put a lot of money into these houses? If this contract were abrogated with us, the house would be absolutely useless. We could do just as well at any other point. In the elevator of 1,000,000 bushels capacity at Kansas City transfer is made of 80 cars a day. The rate for transfer in public elevators at Chicago is three-fourths of a cent per bushel, including ten days' storage.

Mr. D. MILLER. If the Union Pacific Railroad should find themselves able to get their transferring from car to car performed without expense to them, would you still insist that the grain you buy on the Union Pacific should go through your house at Kansas City?

Mr. HEFFELFINGER. I would insist upon their living up to their contract by reason of which we made this large investment.

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Mr. MILLER. I understand that all the connections of the Union Pacific at Council Bluffs will receive and transfer grain for the Union Pacific without cost to them.

Mr. HEFFELFINGER. That may be, for all I know.

Mr. MILLER. Then why should they pay a cent and a quarter when they can get the work done for nothing?

Mr. HEFFELFINGER. I know it is strongly competitive. I know the Burlington is seeking to get our grain.

Mr. MILLER. They pay a cent and a quarter for work which they can get done for nothing.

Mr. HEFFELFINGER. I hold it is absolutely not so. I will further state that the Burlington road has had about one-third—in looking up the last two or three years—of the grain that the Omaha Elevator Company has handled in Nebraska through the Council Bluffs house.

D. MILLER, vice-president, in charge of traffic of the Burlington System:

384 Regards the allowance of 1¼ cents for a transfer of grain at Council Bluffs or other points excessive because it is not a transfer from car to car, but is taken into the elevator and mixed, blended, etc. This is absolutely necessary for the grain men, while all the railroads require is a transfer from car to car. The payment of 1¼ cents when it can be done for one-fourth as much gives the grain dealer a monopoly of the grain on the line, and amounts to a reduction in rate or a rebate. The Burlington owns an elevator at East St. Louis and performs the transfer service for one-fourth of a cent a bushel, including ten days' free storage, at a profit. An allowance of 1 cent is given to Green, who is the same on the Burlington as Peavey is on the Union Pacific, but this is forced by competition. Green insists that his grain
387 must go through his elevator for mixing. Other lines entering Kansas City stand in regard to the grain business in the same position as the Union Pacific, and the Burlington makes no allowance because the connecting lines assume that. Burlington and Santa Fe haul most grain into Kansas City and haul less out than other roads.

The Burlington would transfer grain from the Union
390 Pacific cars to Burlington cars at Council Bluffs without charge. This transfer could be made so as to release the cars as rapidly as they are now released in an elevator of 250,000 bushels capacity, in which 200 or 250 cars per day could be taken care of. The Burlington would guarantee to take care of the grain and would be equipped to do the transfer itself. The larger house built by Peavey & Company was for the grain dealers' business and not merely for the railroad transfer. When loaded in foreign cars a large portion of the grain could be forwarded through to Chicago without transfer, and thus the allowance to Peavey need not be made.

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At St. Louis the Burlington has about $300,000 invested in the elevator, and net results the year before showed $15,000 profit at a charge of one-fourth of a cent for transfer. Some storage beyond the ten days was charged for, but most of it was from a transfer charge. Burlington has made a contract for the construction of a million-bushel elevator at Kansas City. A terminal elevator is indispensable to the expeditious and economical handling of grain.

Commissioner CLEMENTS. You say this (allowance to owner of grain) is a vicious practice and tends to create a monopoly in favor of shippers who have this allowance?

Mr. MILLER. Yes. The effect of this allowance on the independent buyer is that he has to sell to the terminal elevator people largely. It affects the man who has grain to sell by decreasing the number of markets he has to sell in, and he is confined largely to terminal elevators. It does not cause him to get a less price, because there is enough outlet to keep the prices up.

Mr. STUBBS. Mr. Miller, is it not true that every line * * * has some particular firm like Peavey & Company? * * * That is true, is it not?

Mr. MILLER. Yes, sir; that is true. It confines the business to those few people.

Mr. STUBBS. Do you wish to be understood, or do you believe it to be the case, that that fact arises from the Union Pacific contract with Peavey & Company?

Mr. MILLER. No; I do not think that that contract is responsible for that.

Mr. STUBBS. Then there must be some other reason for it?

Mr. MILLER. I think that these terminal elevator arrangements are responsible for that situation * * *.

It gives them to that extent an advantage, and therefore they control the business. The contract with Peavey & Company is only one of them.

403 The Burlington does not transfer the grain of Harris at Burlington, because he insists on having his grain go through his elevator and that he be paid an allowance of 1 cent to put him on a parity with other dealers. The contract with Peavey is one element which is responsible for this, because the Union Pacific is one of the principal competitors of the Burlington.

The 30 or 40 per cent of grain on the Union Pacific which is bought by independent shippers eventually is bought by the large dealers. Arrangements with elevators result in better handling of the grain and redounds to the benefit of the grower and shipper, but the evil is in the excessive allowance for transfer through the elevator. The elevator system of handling grain is absolutely necessary. The grain need not necessarily go to these particular elevators if equal
413 facilities were open to other elevator men on all the roads.

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If there was no allowance, or if the allowance were substantially equal, the monopoly would not be created by the railroad. There are a number of grain dealers who operate a country line of elevators and have no terminal elevator.

The Great Northern built an elevator at Duluth of the capacity of 3,000,000 bushels. This is not simply for transfer, but is used for storage of grain during the winter, when navigation is closed. At Duluth one-half cent a bushel is charged for transferring grain from cars to boat. The great Northern also built an elevator at Minneapolis of capacity of 1,500,000 bushels, but does not operate it.

412 Can prove that the price paid on the Union Pacific for wheat is higher than is paid on the Burlington.

VOLUME I.—DEPOSITIONS TAKEN IN 1903.

JAMES E. SEAVER, vice-president and general manager, Midland Elevator Company, Kansas City, Mo.

424 Line elevators are companies operating one or more elevators not confined to one particular station. Independent elevators are elevators owned by a firm or corporation; ordinarily just one house at one place. Independent dealers are dealers who have no elevator facilities. The Midland elevator buys very little grain from independent-line elevators and independent dealers. Buys almost entirely from the farmers. Line elevators are competitors of the Midland Company. Independent elevators and independent dealers are competitors of line elevators.

430 There is only one firm besides the Midland who has a terminal elevator at Kansas City, the Rosenbaum Grain Company. The Midland Elevator Company buys some grain on the floor of the exchange in Kansas City. Some elevators on the Atchison, Topeka & Santa Fe, Missouri Pacific, Rock Island, and Kansas City & Northwestern are accessible to the Union Pacific.

441 At 31 out of 40 points where the Midland Elevator Company has elevators there are other line and independent elevators competing for the business. Midland elevator handles about 30 per cent of the Union Pacific receipts through the elevator at Kansas City.

443 More grain is purchased by independent dealers and shipped to Kansas City than by the Midland Elevator Company.

464 There are 150 stations on the Union Pacific proper in the Kansas grain belt.

The Midland Elevator Company has been operating in Kansas since 1890. All of the 40 elevators throughout Kansas have been added since the allowance was made. The 40 elevators of the Midland Elevator Company are situated on the property of the Union Pacific, as is also the Midland elevator at Kansas City, for which nominal rents are paid.

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E. P. PECK, vice-president and general manager of the Omaha Elevator Company:

444 In Mr. Peck's testimony, independent dealers means dealers having an elevator. There are very few of what are known as track dealers. Of 202 elevators on the Union Pacific in Nebraska, 127 are owned by five line companies and 75 by independent dealers, and the Omaha Elevator Company owns and operates 71 of the 127. There are five or six stations on the Union Pacific where the Omaha Elevator Company has the only elevator. Thinks there are 112 stations on the Union Pacific in Nebraska where grain is shipped, and there are, therefore, about 41 stations on the Union Pacific in Nebraska where the Omaha Elevator Company has no elevators. Omaha Elevator Company buys largely of farmers. There is a large mill at Schuyler, Nebr., on the Union Pacific, where a large amount of wheat is milled.

There are only 2 terminal elevators at Council Bluffs, Iowa, one owned by the Omaha Elevator Company and the other by Trans-Mississippi Grain Company. There is competition between

450 carriers at some stations in Nebraska.

Witness thinks Ferguson, a dealer in grain on the Burlington road, has 80 elevators.

Peavey & Company in 1890 bought a line of elevators owned by the Omaha Elevator & Grain Company and began business.

454 Peavey & Company do buy occasional cars of grain at points where they have no elevators. Their operations are confined to the Union Pacific territory.

VOLUME II.—HEARING OF SEPTEMBER 17, 1906.

Mr. HEFFELFINGER, of the firm of Peavey & Company.

89 Peavey & Company control the Interior Elevator Company, the Republic Elevator Company, and the Duluth elevator at Minneapolis. At Duluth, the Globe Elevator Company, the Belt Line Elevator Company, and the Peavey Duluth Terminal Company are controlled by Peavey & Company. At Chicago, they own the Peavey Elevator Company. At Omaha, the Omaha Elevator Company and at Kansas City the Midland Elevator Company are operated under Peavey & Company. The British American Elevator Company at Winnipeg is also under the control of Peavey & Company.

92 At Minneapolis, of a capacity of from thirty-five to forty million bushels, Peavey & Company owns 6,500,000. At Duluth, of a capacity of thirty-five or forty million bushels, Peavey & Company have 12,000,000. At Chicago, 2,750,000 bushels capacity, and at Omaha 1,500,000 bushels capacity, and at Kansas City,

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1,000,000 bushels are controlled by Peavey & Company. This includes all the terminal elevators controlled by Peavey & Company.

In the country elevators the grain of the farmers is stored
96 at a legal rate. They are allowed free storage for twenty days. That is, if they bring in grain and want to ship it out, there is a legal rate charged, covering the shipping and including 20 days' free storage. If they sell it to Peavey & Company there is no charge. When grain is bought on a margin no charge is made. Peavey & Company buy most of the grain that is brought into the elevator.

101 The Terminal elevator at Omaha has about 74 line houses on the Union Pacific. The Midland at Kansas City has about 50 line houses on the Union Pacific. The Monarch at Minneapolis has 120 houses, nearly all on the Great Northern. Union Pacific owns no stock in the elevator companies.

Peavey & Company have very little apparatus at country houses for cleaning and blending grain. Cleaning is done mostly at the terminals. Mixing may be done at any country station.

Of the grain received at Omaha by Peavey & Company,
106 60 per cent is corn and about 5 per cent is cleaned. Wheat is almost all cleaned. Wheat received last year amounted to 15 per cent. Oats amounted to about 15 per cent. A very small percentage of the oats is cleaned. None of the grain bought along the line of the Union Pacific in Nebraska goes by the elevator. About 60 to 75 per cent of the grain bought in Kansas went to the elevator at Kansas City. Approximately 80 per cent of the grain that goes to Kansas City goes through the Midland elevator.

Prices to be paid on grain at Kansas City are fixed largely by the Kansas City market. The grain bought on the Union Pacific
120 is not billed to Omaha, but is all billed to St. Louis. Grain is shipped from the Omaha elevator to Minneapolis, Chicago, New York, Baltimore, Philadelphia, St. Louis, Kansas City, and some to New Orleans and Galveston and possibly Boston and Duluth. Grain shipped to Duluth and Minneapolis is not sent by way of St. Louis, but all grain is billed to St. Louis from Nebraska points. Peavey & Company pay the proportion of the through rate to Omaha which is the same as the local. If Peavey & Company had no elevators at terminal points, they would ship to grain dealers who would buy it. With the same investment in the country that they have at Council Bluffs, Peavey & Company could make as much profit as they do now. "The assumption all along, Mr. Chairman, and members of the Commission, that Peavey & Company must have an elevator at Council Bluffs and Kansas City in order to take care of their grain business, I want to absolutely dispute. I want to make it forcible that we offered to sell the elevators and agree not to build any more at Council Bluffs or Kansas City; that we can

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handle our grain business in the country just as well without those elevators as we can with them."

Peavey & Company in building the elevator at Council Bluffs bonded it for its cost, and have paid off about $15,000 a year from the profits of the grain business, not out of the elevation, amounting in all to $105,000 of the cost, and have paid dividends beside. Most of the grain in the elevator at Duluth is shipped down the lakes and is not consumed in Duluth. No allowance is paid at Duluth or any other place other than Council Bluffs and Kansas City. None of the elevators at Minneapolis were built since those at Council Bluffs. Are rebuilding one at Duluth which burned.

Peavey & Company handle grain at Duluth in the usual manner. Duluth is not only a market for the mills at Duluth but is a world market. "You can go into Duluth and in an hour sell 5,000,000 of stuff and you could not sell 100,000 bushels in Omaha without knocking the price in twenty-four hours." Peavey & Company sell grain in Chicago that is stored in Omaha, Minneapolis, or Kansas City. There was received at Minneapolis, in 1905, 96,000,000 bushels, and there was ground there about sixty or sixty-five million. At Duluth grain can not be shipped after December when navigation closes and does not open until the first of April or May. For a number of years previous to 1905 there was no carrying charge at Duluth.

The grain year is the same as the fiscal year. The total receipts of grain at Omaha elevator during the year ending July 30,
180 1906, was 9,500,000 bushels, of which 7,500,000 were from the Union Pacific. The other 2,000,000 came largely from Iowa. No allowance was received on the grain from Iowa. The grain from Iowa was treated in the same manner as the grain which came from the lines of the Union Pacific. For the year ending July 1, 1905, the receipts at the Omaha elevator were a little over 5,500,000 bushels, all of which came from the Union Pacific lines. For the year ending July 1, 1904, the receipts of grain were about 5,750,000. It was estimated that the receipts of the Omaha Company were 30 per cent of the entire shipments on the Union Pacific. Of the balance, the Trans-Mississippi Company might handle four or five million bushels. The balance is handled by inde-
186 pendent elevators, track shippers, and farmers' shipments.

The grade of the wheat along the line of the Union Pacific in Nebraska is Chicago Grade No. 2 hard. It might be Omaha Grade 2 hard and 3 and 4. The price of grain at Omaha is affected by other markets. It was formerly the custom to charge the Union Pacific on all grain going into the elevator and refund the allowance on any which was used locally, but lately the charge has been paid on outgoing grain. The allowance is paid irrespective of the kind of car that brings in the grain, of the kind of car that takes it out,

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and the point to which it is sent. The Omaha Elevator Company transferred approximately half a million of grain for Mr. Cowgill for which he paid no charge, showing they were willing to transfer for other people, but the Union Pacific paid the regular allowance of 1¼ cents per 100. The identity of this grain was preserved in the elevator. The Omaha Company does practically no storing for other dealers in Nebraska, but in Kansas some grain is stored. Grain from the Omaha elevator went to Baltimore, St. Louis, Chicago, Minneapolis, and Kansas City. The through billing to St. Louis was used because it was the custom; grain could be rebilled at Omaha to other markets.

Prior to the construction of the elevator at Omaha, Peavey &
Company operated an elevator of about 300,000 to 500,000
210 bushels capacity. Operated a house owned by the Union
Pacific which was torn down when the new elevator was built and received 1¼ cents allowance. No rent was paid on the old house.

In the information of the witness none of the minority
214 stock in the elevator companies is owned by stockholders of
the railroad company. No official of a railroad company is an official of the grain company.

Millers had rather buy grain of a grade direct from the country than grain after it is mixed in the elevator, because it is a little better.

There is no reconsignment charge on grain which is sent to other destinations after being billed to St. Louis. Thinks there is no reconsignment charge to farmers for this service. As a matter of fact, although grain is billed to St. Louis, it goes into the elevator and may be mixed with grain from Iowa and goes wherever the market may dictate.

"We might buy it (grain) under the Chicago market out in Nebraska. That might be a cash market which was 1 cent under future. In Nebraska we would buy on the basis of the discount. We might hold the grain there (Nebraska) until next May, then we might send to St. Louis and realize a cent a bushel more, a cent a bushel premium, thereby making a profit of 2 cents per bushel for carrying the grain." The price of grain to the country buyer is determined by the highest market.

Of between fifty and eighty million bushels of grain pro-
227 duced on the Great Northern, Peavey & Company handle but
5,000,000 bushels, while on the Union Pacific they get about one-third of the entire business. The Great Northern occupies a much larger territory and Peavey & Company do not operate at as many stations proportionately. Peavey & Company own 70 or 80 country elevators on the Northern Pacific, but they are operated independent of terminal elevators. If it is unloaded in the terminals of Peavey & Company, it is only when the manager of the terminal

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buys it of the manager of the country line. There is no line of railway where Peavey & Company have the only elevators on the line. Out of 450 stations there are about 30 where there are no other elevators. Farmers will sometimes haul grain 20 miles for 1 cent a bushel extra. Does not think the allowance of 1¼ cents enables Peavey & Company to enter into more effective competition on the Union Pacific. A large percentage of the receipts of the company is from farmers. Thinks agreement on the price to be paid for grain between dealers does not eliminate competition.

The Union Pacific is the only line in Nebraska on which Peavey & Company have elevators. The Union Pacific is the only line on which Peavey & Company do any track buying. This is because they do not branch out; because it is cheaper to do as much of their business as they can on one line. If a railroad would assure them a good return on the money invested, they might be willing to go on another line.

Mr. E. P. PECK, general manager of the Omaha Elevator Company, Omaha, Nebr.:

243 Has been connected with the Omaha Elevator Company for sixteen years. Peavey & Company, at about the time he came with the company, bought what was known as the Omaha Union Grain Company elevators, about 35 in number. At the time he entered the company it was operating a 500,000-bushel house at Omaha, owned by the Union Pacific Company and some other parties. Thinks they paid rent for it. In the old house at one period the allowance was 1¼ cents. Has received from the Union Pacific either 1¼ cents or 1½ cents ever since he has been connected with the company. Also operated a house that burned down at Council Bluffs, which held about 750,000 bushels. These elevators were operated under a written contract with the railroad company.

250 All grain on the Union Pacific that goes to Council Bluffs is billed to St. Louis. A new bill of lading is made out when the grain is shipped out of the elevator.

At the time the grain goes into the elevator the ultimate destination is not known, and it is not known how long the grain will stay in the elevator. When the grain is shipped from the country it is not known whether or not it will be mixed or blended. There are in the elevator cleaners, a drier, a purifier to purify oats, the Hess system in which sulphur is used to brighten up the oats. The elevator is operated in the same way that terminal elevators and mixing houses are ordinarily operated, and the grain is shipped out to whatever market seems at the time the best.

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Two million bushels of grain were bought during the previous year on other lines than the Union Pacific Railroad; part of it came from Iowa and part from Nebraska over the Burlington, North Western, and Rock Island. Are still buying grain off other lines. That grain is not shipped out on the billing of the Union Pacific. Some of the grain that goes from the Omaha elevator goes to the
262 Midland elevator at Kansas City and the allowance is paid on it there. The proportional rate from Omaha to Chicago is 9¾ cents on corn, while the local is 15 cents.

To store grain at Omaha in a public elevator for twenty days would cost three-fourths of a cent a bushel. Some grain of the
277 Trans-Mississippi Company has been elevated through the Peavey elevator, because their elevator burned. Practically no grain other than that of the Trans-Mississippi Company and Peavey & Company goes through the Peavey elevator. Track buyer could do business Peavey does without elevator. There are about 200 elevators along the line of the Union Pacific. Peavey & Company own abqut 74, the Trans-Mississippi Company own about 24 or 25, and the remainder are owned by independent buyers. These buyers sell their grain at Chicago and Minneapolis. The majority of this grain is sent through to Chicago and does not stop at Omaha. Also sent to St. Louis, Memphis, and Cincinnati. The through rate is no less than the local in and proportional rate out. The grain from Iowa goes to Chicago on the proportional of 9¾ cents and to St. Louis at 6¾ cents. Five cents is the lowest rate into Omaha, from points in Iowa. Although the tariff naming the proportional states "at and west of the river," the railroads take grain which originated in Iowa on the proportional east.

288 Commissioner PROUTY. It must follow, Mr. Peck, that grain shipped from interior points to Chicago by the Union Pacific, straight through without being unloaded, pays a rate of a cent and a quarter a hundred pounds more than your grain does?

Mr. PECK. We pay the same tariff exactly as anybody else.

Commissioner PROUTY. I understand, but you get back a cent and a quarter for this transfer there?

Mr. PECK. We get it back for performing the service of relieving the equipment.

Commissioner PROUTY. I am not talking about the justice or the lawfulness of it, but I am saying the fact is that it costs him a cent and a quarter more to get his grain through?

Mr. PECK. Yes.

Commissioner PROUTY. Now, is that repaid to him on the grain in Chicago in any way? Does he get an allowance from the elevator in Chicago to offset that?

Mr. PECK. Not at the present time; I do not think he does.

An allowance was, at times during the previous two years, paid to the independent shipper at Chicago for releasing equipment. The independent shipper performs no service, has been at no expense, whereas Peavey is at expense of relieving Union Pacific equipment. The Union Pacific makes the allowance to all elevators at the time of hearing. Grain coming in by some other route, the Burlington, for example, is allowed cost of transfer and weighing, whatever the cost is. The cent and a quarter allowance leaves no margin of profit to Peavey, i. e., the expense of running the elevator is more than the allowance. Does not consider that they are at any advantage
294 in the market by reason of getting 1¼ cents. The operating expense of running the elevator for the previous nine years was more than 1¼ cents. The operating expense includes the storage of grain, the unloading of the grain, and the mixing of the grain. It also includes the drying, purifying, and handling of the grain, but does not include office expense, expense of management, insurance on grain stored, investment, and depreciation. The expenses of the elevator are charged on the one hand and the 1¼ cents on the other; no credit is made for the profit made in the handling of the grain.

304 Fifteen thousand dollars of the bonds of the elevator is paid off annually from the profit of the grain business of all the elevators.

The tariff of the Burlington says: "This company will pay the cost of transferring grain from car to car for the purpose of releasing foreign equipment or for ascertaining weight." It was the established custom that where grain was going through the transfer charge at Omaha was borne by the connecting line. The Rock Island does its own transferring at Omaha and has a small house. The Great Western does its own transferring at South Omaha. Before the Peavey elevator was built the eastern lines paid for transferring grain at the Union elevator at Council Bluffs. The Burlington has never paid Peavey & Company anything for transferring grain under the tariff quoted, as tariff is just out and the manager has never asked them to. Since the through rate is the same as the local in and the proportional out, there is no advantage in the through bill of lading, and the service performed by Peavey is same in both instances. The grain on which the allowance is paid does not all belong to Peavey or the Omaha Elevator Company.

Mr. KELBY. But substantially all the grain that has been unloaded into your elevator has been your own property?

Mr. PECK. A large percentage of it.

Mr. KELBY. Ninety-nine per cent of it?

Mr. PECK. I don't know.

336 An elevator of the character of the Peavey elevator and the operation of it would not be necessary as a mere transfer proposition. Peavey & Company could not erect an elevator of the size and capacity of the Peavey elevator and conduct it as they do and treat grain as they do for 1¼ cents per hundred if they had no interest in the grain.

Direct transfer through a transfer elevator from car to car could be done for $3.50 per car when there were plenty of cars. When there is a large volume of business, there must be some storage to relieve the western cars, and for that reason Union Pacific required an elevator of 1,500,000 bushels capacity. Direct transfer from car to car could be done in a mere skeleton structure, but this would not allow storage.

A. B. JAQUITH, Omaha. For thirteen years prior to July 1,
357 1903, vice-president and manager of Omaha Elevator Company:

Peavey & Company operated two terminal elevators at Omaha prior to the building of the new one. One of these was operated for about eight or nine years. The capacity of the two was 1,750,000 bushels. During these years they received allowances from the Union Pacific, part of the time 1½ cents and part of the time 1¼ cents per 100. The terminal elevators at Omaha were a necessity in the way of business, because it would be a saving to have only one set of machinery for cleaning, etc. All the machinery and appliances
362 were at Omaha and Council Bluffs. There was a country house fitted up in 1900 for the purpose of handling grain that went to Denver, but not the grain going east. If the machinery were in the country elevators, the expense would probably run up to between three and five hundred dollars per elevator, which would not include cost of machinery; only the wear and tear and the additional labor. Besides cleaning, there is proper and legitimate mixing of grain, raising its grade, and blending the different qualities of grain from different sections of the country or territory, which at times can be done very profitably and can not be done at the local point. For instance, the north half of the territory may have very heavy wheat and the south half very light, and if sold separately would practically sometimes in the purchase price show no margin, but if properly mixed and manipulated and sampled out at terminal would bring a good
365 profit. Storage would be cheaper in the country. Now, on the advantages, you have stored up at your terminal grain that you can absolutely bet on its quality because you know it. A miller wants 25 cars or an exporter is short one or two cargoes and he must fill that cargo or suffer the penalty that the ship charges. Hence a terminal elevator often secures a good premium over prices

that he could secure if shipped from various country points, which could not be done so quickly. This demand occurs in one form or another from one place to another right along.

366 I consider such a terminal is absolutely necessary and essential to the proper management of any country line, and if competition is close any country line may go broke on close competition as compared to a country line that has its terminal.

Has been in the grain business for twenty-nine years or thirty years. In some respects an elevator at Chicago would be as useful as an elevator at Omaha, but for Nebraska grain the elevator at Omaha is more advantageously located than any other in the United States, as it would reach more markets than any other one place. Grain at Omaha can reach markets at New Orleans, Galveston in the southern trade, and the Minneapolis mill trade. It can also reach Baltimore, Philadelphia, Newport News, New York, or Boston. Witness says that the elevators control the Omaha market. He performed the same services of transferring grain from Union Pacific cars within the previous three months and put in a claim and the Union Pacific refused the claim. Now they have published a tariff and will pay for the transfer.

370 The business of the elevators affects the market price of grain in that "When every elevator in Omaha was receiving this advantage they were bidding more in the country than they could secure or did secure for the grain. They divided the ele-
371 vation charge in order to secure the business." The grain that gets the benefit of the allowance brings more on the exchange than grain that does not. "Does that occur right along? Is that a matter of ordinary custom on the grain exchange?" "There are periods of time when it is only payable to the Omaha Elevator Company and the Trans-Mississippi Elevator Company; that for certain reasons of their own they may not pay me or John Jones a premium for that grain; but ordinarily on the market, as is shown when all elevators are receiving it, they are perfectly willing, and I could bring plenty of testimony to show, from the elevators and buyers themselves, that they paid—in other words, that they divided this one and a quarter elevation charge—paid me enough money for the grain on the market in order to secure a profit for them, splitting the elevator charge."

On lines not paying an elevation charge now grain can not be sold as readily as on the Union Pacific and does not command as large a price, generally a half to three-quarters of a cent difference per bushel on wheat or corn.

374 A 100,000-bushel house could be arranged to transfer or hold up 75 cars if necessary and transfer more grain than the Peavey elevator, more cars of grain. It is true that at times the Union

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Pacific moves in more cars than there are cars to take the grain out. A 100,000-bushel elevator would be sufficient if the cars were always there to put the grain in so as to release the inbound equipment. Witness thinks an elevator of 300,000 bushels would take care of and store, even in a time of rush, as much grain or more than has ever been necessary to be taken care of in a time of rush.

375 It often happens that country elevators are full and it is desirable to relieve them, and whether or not they can be relieved depends upon the rapidity with which the equipment can be released at Omaha. There have been times when Union

382 Pacific cars were loaded at Council Bluffs for shipment east, and on these cars the allowance was allowed. Thinks they wanted 100, or 200, or possibly more. Rather difficult to state, but should judge that an elevator which could transfer as much grain as the Peavey elevator could be built for $50,000. "Now, I am not an expert on that."

Mr. GREEN. Now, what would be a fair price for transferring grain through the Peavey elevator at Omaha, considering all the circumstances?

Mr. JAQUITH. It would entirely depend on how much you would transfer—what you would depend on—or the volume it would move.

Mr. GREEN. At the time you had charge of it, what would be a reasonable fee for the service performed—a mere transfer service for the railroad company, taking into consideration all your other business and everything else?

Mr. JAQUITH. I would certainly contend it was worth 1½ cents.

Mr. GREEN. Of course, while you operated the elevator you got all the allowance you could?—A. Why, surely.

Q. It depended upon what the Union Pacific felt they could afford to pay?—A. Yes, sir.

Grain handled by Peavey through the elevator during administration of witness ran from practically nothing in 1894, when there was a failure, to about 8,000,000.

389 There are in and about Omaha probably eight or ten elevators, having a capacity of six or seven million bushels. The larger ones are controlled by the Omaha Elevator Company, the Terminal Elevator Company, the Updike Elevator Company, the Merriam & Holmquist Elevator Company, and the Trans-Mississippi Elevator Company. Probably seven elevators have been built since 1903.

Q. Now, these elevators that have been built there the last two or three years have been built without any regard to the allowance?—A. Not all of them, but a fairly good proportion of them. Eleva-

tors like the Updike on the North Western and Nebraska-Iowa on the Burlington would not have been constructed "unless they had something coming."

393 Witness thinks the allowance paid for transfer is really a rebate and is a restriction of trade as against people not owning elevators or large lines of business. It is not contended that all of the new elevators erected are to receive allowances in the nature of a rebate.

385 While operating the elevator prior to the contract Peavey & Company received allowances which varied from time to time, but it was never less than 1¼ cents.

392 "The Union Pacific contract was always open, you know, and the B. & M. and these other various roads paid the money and in some cases, it has been demonstrated, 3 cents a hundred instead of 1¼, and I construe that to be the same as a rebate * * *." The payment of allowances by the railroad companies has been a detriment to the Omaha market. "The Union Pacific has been a benefit, but other roads have figured to carry it around Omaha or we would have had a better market to-day."

398 Witness contends that the terminal elevator is necessary for the operation of a line of country houses, and it will be built anyway, whether at Chicago, Duluth, or Minneapolis, and any man having elevators in Nebraska will build his terminal on the Missouri River or in Nebraska with or without elevation, for the reason that there he has a better outlet for his grain and reaches all the markets and could not afford to put his elevator in Duluth or Chicago or St. Louis or New Orleans.

401 Witness had transfer service performed by the Updike Grain Company at Omaha, and paid three-fourths of a cent a bushel and filed claim for 1¼ cents a hundred, but has not been able to collect the charge from the Union Pacific. On cross-examination did not know where grain originated or where it was when he bought it.

Commissioner CLEMENTS. Can you tell from your experience to what extent the selling price of grain is increased by this manipulation under one form or another, this cleaning and purifying, blending, etc.?—A. Well——

Q. How much profit is there in that upon an average, where the owner of the elevator is the owner of the grain?—A. You can not very well average it. In my experience where you do not keep a terminal and a country line separated, it is very difficult to tell where the profit exists. Where there is a carrying charge of 7 cents per hundred for May wheat, and the carrying charge on oats, where you stack up this grain on the basis of Chicago market, by reason of

its location at Omaha, and it finally goes, perhaps, to Baltimore, New Orleans, or Minneapolis, at a 3-cent-a-bushel better basis, there is a fairly good margin in the terminal.

Q. You can not answer the question?—A. I can not say offhand on an average what it cost and no other man can.

Q. You can not say how much profit there is in this manipulation where the elevator man is the owner of the grain?—A. It depends on the capacity of the elevator.

Mr. GREEN. Can you state the source of profit that may be placed to the credit of this terminal elevator in your business as you handled it from year to year?—A. Sir?

Q. During your administration could you form any judgment as to the source of profit of the business attributable to the terminal elevator and the handling of grain in it?—A. I don't think that question could be fairly answered. I have already answered it by saying that as against competition they can not—any country elevator—run as against close competition without a terminal.

Q. That is virtually in the nature of a conclusion. That don't give the whys and wherefores.—A. The judgment of twenty years is better than a guess per bushel when you can not furnish the figures, in my judgment.

Sometimes by blending, mixing, etc., 3 cents a bushel can be added to the price of the grain and at times not more than one-half a cent a bushel can be added.

405 Q. Suppose you have wheat that is rather poor, what in the northeast would be called "no-grade wheat," can't you treat that so that you can use part of it in mixing it with higher grades and bring it up?—A. In buying it at its actual value on the tables there are times when you can mix it with qualities that you have upon the table at the same time through your elevator, and secure 4 or 5 cents a bushel on the grades, but those are snaps that you pick up from time to time. "I don't know of an elevator
407 on the Missouri River but what to-day are putting up wheat in their terminals and hedging it for May or December because the carrying charges are good and there is a profit in it."

It is an advantage to the shipper as well as to the railroad company to get the cars back into the country quickly to be reloaded,
411 and the nearer a terminal elevator is to the country elevators the more of an advantage it is.

At the time witness purchased the grain on which he paid the elevator charge he purchased it on the exchange for May delivery and did not know whether the grain was in the elevator then or whether it came in later.

In 1890 Peavey & Company purchased a line of elevators in Nebraska and leased the elevator at Omaha from the Union Pacific for about

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$14,000 a year. At the same time they leased the elevator belonging to the six railroad companies at about $5,000, which they operated, except for a short time, up to 1899. Prior to the purchase of the line elevators by Peavey & Company the Union Pacific was
429 paying an allowance to their predecessors. "Greenleaf & Baker had an elevator on the Missouri Pacific and various other people did also. They did not have contracts, but they received the money just the same, and the B. & M. road and various roads during this period from 1900 to—well, prior to and during the time of this contract. * * * This contract (Peavey contract) I consider the fairest contract that was ever made between railroad and a shipper, and practically, I guess, the only one in existence at that time. The rest were all fixed up under cover." The compensation named in the contract was reasonable compared with the com-
435 pensation being paid by all other roads at that time. The contract was based partly on what competitors were getting on competitive lines and partly on what the service would cost.

The CHAIRMAN. Did you at the time consider that it had the effect of giving Peavey & Company an advantage over other buyers?—A. I do not know as I remember what I construed it at the time. I say that I considered it a good thing.

Mr. BALDWIN. Yet you are pressing a claim against the Union Pacific based upon this rebate charge, aren't you?

Mr. JAQUITH. If they legally can pay a rebate to the Omaha Elevator Company, I want my money when I perform the same service.

Q. In other words, you expect to maintain in a court of justice a claim the basis of which you now confess to be a rebate?—A. It is not a rebate to me.

Q. Oh.—A. I paid them that much for the service.

Q. Oh, then there was a service in this. It is not a rebate when it is a service?—A. I paid that much.

Within the last two or three years elevators have been built at or near Omaha by Updyke Grain Company, Nye-Schneider-Fowler Company, Merriam & Holmquist, Cromwell Lumber & Grain Company, Nebraska-Iowa Grain Company, Great Western, Van Dorn Company, and the Drodge Company. So there has been no material effect so far as progress is concerned by the fact that the Union Pacific has been making this allowance. Since June, 1906, the allowance of 1¼ cents has been allowed to all shippers who transfer grain. The Union Pacific grain has since commanded one-half to three-fourths of a cent better price, which benefit goes to the farmer. If all the railroads should make this allowance, it would not be for the benefit of all, because the market is as broad as an elevator outfit will allow it to be. The payment of an elevator charge to elevators only works against the interest of all commission houses, and you can not have a

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large, broad market unless you have got a number of men who are working for the small trade among the different mills, and at those various places that the elevators skip.

471 The cleaning of grain could be done at Chicago as well as at Omaha. The only advantage to the Omaha elevator would be the different markets it could reach. There would also be some advantage to the Chicago elevator in regard to markets. The advantages at Omaha would be greater than at Chicago.

474 There are a number of independent dealers in Nebraska who have no terminal elevators, but the number of those prospering prior to the organization of the Nebraska Grain Dealers' Association was very few. The country elevator operators were not dependent on the terminal elevator. They prospered without the terminal elevator. Had it not been for the contract with the Union Pacific during certain short crop years, Peavey & Company might have seen fit to close up that elevator for a time and save expense.

480 Q. Did you at any time (while manager of the Omaha Elevator Company) go into the country and buy grain at any local point, paying a larger price than you otherwise would, in order to get the business for the Union Pacific Company?—A. Well, ordinarily a party receiving benefits—or a corporation—from a railroad, they would naturally protect their interests at junction points or common points, and thus pay more for grain than they would otherwise, or keep open some stations that they might close.

In times of rush, cars were held by the Omaha Company over free time. Is practically certain that they did not pay demurrage on these cars.

Mr. MARBLE. Mr. Jaquith, these questions asked you relating to division of the allowance. Did you at that time (when manager of Omaha Elevator Company) make your bids in the country higher because of getting that allowance?—A. Ordinarily, no; and it was only exceptional cases that it ever occurred.

Q. Did it ever occur in exceptional cases?—A. I think so; yes, sir.

Q. What was the exception?—A. Well, I would have to brush up a little.

L. S. GILLETT, president of the Electric Steel Elevator Company, which company is a terminal at Minneapolis:

499 Receive no allowance from railroad companies delivering grain at that elevator. The grain is handled, mixed, purified, etc., in the elevator. Thinks that any person operating elevators and receiving allowances of 1¼ cents per hundred could use that allowance for the purpose of putting up the price of grain they purchased and put into an elevator so as to monopolize the business as against parties who do not receive such allowances.

501 Three-fourths of a cent a bushel would be a good fair charge for handling grain. The Electric Steel Company is a terminal proposition entirely. It has no connection with country houses. The elevator is of 2,750,000 capacity, fireproof. The company buys grain on the Minneapolis Exchange exclusively and the dealers deliver it to the elevator, and it is held there. This is true of 90 per cent of the grain. It does some transfer business for other people. Is situated upon three lines—Great Northern, Northern Pacific, and Great Western. If grain is bought located in any elevator not upon those roads, generally speaking it is delivered through the transfer company, which pays the transfer charge.

504 There is no agreement with any railroad company to unload cars promptly. One-half of a cent a bushel is transfer charge, which includes ten days' storage. Over ten days' storage is charged at one-fourth of a cent for every ten days or fraction thereof, except that from November 10 to May 10 they do not exact more than 4 cents.

If any railroad company entering Minneapolis should grant 1¼ cents transfer charge to all the elevators they might drive the men without elevators to do business without a profit, at least.

L. T. SOWLE, Minneapolis. Commission and elevator business. Built the first terminal at Minneapolis and some country houses in 1885:

511 No allowance is received for unloading grain into the elevator except the charge made for doing work for anyone. Railroads make no allowance. Handles grain in the ordinary way by mixing, cleaning, blending, etc., and derives therefrom a satisfactory profit.

If the elevators were allowed 1¼ cents by the railroad companies for unloading their grain, it would affect their competitors in Minneapolis, but not so much as the country elevators. They could make them do business without a profit.

GEO. H. CROSBY, freight traffic manager, Chicago, Burlington & Quincy R. R. Co.:

518 The Burlington will assume the cost of transferring freight at Kansas City or Omaha. In the case of grain they transfer it themselves or pay somebody for transferring it. They have not paid anyone since this notice was given out. At Kansas City they have their own facilities and at Omaha they have not had an opportunity. The charge is paid on all grain from a connecting line. It is not a fixed charge because it can be done for less money at some places than at others. What they pay is practically a transfer from car to car and not into terminal elevators at the end of the haul. The cost of transfer is made where the railroad company calls for transfer. They do not pay a loading-out charge to such an elevator as that of Peavey & Company. This would not include the manip-

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ulation of grain, but simply a transfer. The identity of the grain is preserved.

The Burlington formerly paid 1 cent per hundred to Harris & Company at Burlington for transferring grain and releasing equipment. The elevator of Harris & Company was the only elevator at Burlington and would not do it for less. The elevator is not now in operation at Burlington. If it were, they would not pay anything as an allowance.

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GEO. RUPLEY, Duluth, Minn. Engaged in the grain business twenty-one years, during fourteen of which he was manager of terminal elevator at Duluth. Is familiar with the business of country elevators.

Q. Can you state whether or not it is an advantage to a line of country elevators to have in the same territory a terminal elevator at some convenient point; and if so, why?—A. Yes; it is an advantage; there are many reasons why. The principal one is that
3 a terminal elevator receives grain from a number of different localities and can equalize the grades. The line of country elevators which controls a terminal elevator can make up the variation in grades at one station by the very good grades at another station, and if they did not have a terminal elevator they would not have that advantage.

Q. What are the sources of profits in the management of terminal elevators; in what way do you make a profit?—A. Receiving, shipping, and sorting the grain—that is, the grain of other people. Receiving, shipping, sorting, buying, selling, mixing, and improving the quality of their own grain.

4 The terminal elevator would be best situated at the nearest strategic point to the source of production—that is, the point from which shipments can be made to various markets—for the reason that by having grain stored at some point of this kind they can take advantage of the varying conditions in the various markets and ship to most advantageous markets.

Elevators have a regular warehouse charge for handling grain, but railroads do not pay any allowance for unloading or handling it and never have in the knowledge of the witness. If parties receiving an allowance from railroads wanted to do so, they could make parties not receiving allowance do business for nothing. Five cents
12 a bushel would be a very high rate of profit on grain. That would be an exorbitant rate. Taking into consideration the sources of revenue which would include country buying, margin, and terminal profit for handling it might run anywhere from 1 cent to 3 cents a bushel in a successful year. If a shipper having a line of ele-

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vators and a terminal sorts grain at the terminals, he would have to unload the grain anyway, and it would not necessarily benefit the railroad company to have the cars unloaded.

The expenses of operating elevators are taken out of the gross receipts of the business, and if the railroad company should pay 1¼ cents for operating a terminal elevator it would be receiving increased pay.

Q. It would be paid for twice, would it not, as a matter of fact?—A. Yes.

Retired from the elevator business in 1894. He was with the Lake Superior Elevator Company of Duluth, which became embar-
25 rassed, "busted," and was reorganized. Does not think the country line is much more essential to the prosperity and profit of the terminal company than the terminal is to a country line. Has never had experience in handling a line of country elevators independent of a terminal.

The charge was about 1¼ cents per bushel for receiving and shipping, including twenty days' storage. Afterwards there was a rate of one-third of a cent for each thirty days additional. That rate was afterwards reduced to one-half of a cent a bushel for receiving and shipping, including 15 days' storage, and one-half cent for every thirty days additional.

31 The men who would be affected by the allowance of 1¼ cents by a railroad company would be the men doing the same line of business in the same territory, buying of the same parties and selling in the same market.

Elevators in North Dakota do not build terminals at Fargo and Grand Forks instead of Duluth, because there is no market there and because it would be impracticable to do business at a point which was not a terminal of a railroad because of the trouble in furnishing cars a second time.

43 C. E. SPENS, general freight agent of the Burlington lines west of Missouri River. Has been in business about fourteen years:

Prior to the establishment of the Omaha Grain Exchange a very small percentage of our grain was billed to Omaha. During the fiscal year ending with June 30, 1904, but 2.4 per cent of the grain was billed to the Omaha market. During the fiscal year ending June 30, 1905, but 6 per cent was billed to the Omaha market, and for the fiscal year ending June 30, 1906, about 13 per cent.

On our lines west of the Missouri River we loaded, during
45 the fiscal year ending June 30, 1906, about 59,000 carloads of grain, or 60,000,000 bushels, about 46,000 carloads the year before, and 58,000 carloads the year before that. These figures are for Omaha

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During the fiscal year ending June 30, 1906, 40 per cent of our grain originating west of the Missouri River was billed to Missouri River markets, 26½ per cent was billed to all eastern markets, which include Minneapolis, St. Louis, Chicago, the seaboard and the Gulf, 6 per cent was billed to Colorado, and the balance was local for feeding and for mills and for miscellaneous destinations.

The year prior to that 32 per cent was billed to Missouri River markets, 30 per cent to eastern markets, 7 per cent to Colorado, and the balance miscellaneous.

The year prior to that only 25 per cent was billed to Missouri River markets, 6 per cent to Colorado, and 49 per cent to eastern markets; the balance miscellaneous.

The following statement shows elevators located at Omaha and their capacities:

List of elevators at Omaha, South Omaha, and Council Bluffs, and capacity; also railroad on which located.

Elevator.	Railroad.	Capacity.
OMAHA.		*Bushels.*
Nebraska-Iowa Grain Company	Chicago, Burlington & Quincy	125,000
Crowell Lumber & Grain Company	Chicago, St. Paul, Minneapolis & Omaha	125,000
Merriam & Holmquist (2 elevators):		
A	Missouri Pacific	600,000
B	do	125,000
Twamley Son & Company	Union Pacific	40,000
Independent Elevator Company	Chicago Great Western	1,000,000
Nye-Schneider-Fowler Company (under construction).	do	1,000,000
SOUTH OMAHA.		
Updike Grain Company	U. S. yards tracks	500,000
COUNCIL BLUFFS.		
Omaha Elevator Company	Union Pacific	1,500,000
Trans-Mississippi Grain Company	do	500,000
Drodge Bros. Company	Chicago Great Western	50,000
Nebraska Hay & Grain Company	Chicago & North Western Chicago, Burlington & Quincy Chicago, Rock Island & Pacific	25,000
Van Dorn Grain Company	Chicago & North Western Chicago, Burlington & Quincy Chicago, Rock Island & Pacific	50,000
		5,640,000

In addition there are the Chicago, Rock Island & Pacific small transfer elevator and the transfer elevator of C. F. Lefferts, a grand total of 15 houses.

In December, 1903, the freight rates on grain from practically all grain territory west of the Missouri River to the Mississippi River and the East were adjusted on the basis of local rates to and from the Missouri River—that is to say, the through rates were identical with the sum of the locals. Prior to that the through rates were less than the sum of the locals. There are various factors which enter into the establishment and success of the Omaha grain market; one is its geographical location, and taking other markets into consideration, one important factor is the adjustment of rates to what

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we call the break on the river. The Missouri markets can serve other markets as well or better than any other market. The rate from Omaha to St. Paul is 1 cent less than the rate to Chicago and thence to St. Paul, if the grain dealer at Chicago were to purchase grain in Nebraska bring it to Chicago, elevate it, and reship to St. Paul; and the same is true of Duluth. Can also reach Milwaukee from Omaha better than to Chicago and thence to Milwaukee. Can reach seaboard just as well from Omaha as from Chicago, starting from interior. Missouri markets have an advantage over Chicago also in reaching the principal southern territory.

In 1904 the receipts were 16,000,000 in Omaha and in 1905 thirty-two to thirty-four million. Reports of Omaha Grain Exchange, 1904 and 1905, show receipts and distribution of grain by the different points.

The total equipment for the handling of grain by the railroads entering Omaha is 190,000 cars. The total equipment of the Union Pacific is 8,628 cars.

The following is a statement of equipment of the several railroad companies:

Statement of equipment that can be employed in grain traffic owned by lines serving the Omaha market.

Missouri Pacific Railway	25,688
Chicago, Burlington & Quincy Railroad	26,910
Chicago & North Western Railway	29,702
Illinois Central Railroad	29,157
Chicago, Milwaukee & St. Paul Railway	28,436
Wabash Railroad	9,561
Union Pacific Railroad	8,628
Chicago, Rock Island & Pacific Railway	25,890
Chicago Great Western Railway	6,800
Grand total	190,772

Higher prices have been paid for grain when shipped via the Union Pacific than when shipped via the Burlington. On August 16, the Nebraska-Iowa Grain Company, having country elevators and terminals on the Burlington, paid for No. 3 or better corn to the Farmers' Elevator at Dorchester, to J. M. Sewell at Hastings, and to the Spelts Grain Company at David City, 44¼ cents per bushel, while on the same day they purchased the same grade of corn from James Bell & Son at David City, and from John Erickson at Stromburg, paying for the same 44¾ cents per bushel, or a half a cent higher.

Having received a complaint, the dealer was asked why this difference was made, and the reply was that the higher price grain was for shipment via the Union Pacific. Was advised by several grain dealers that grain arriving to be sold in the Omaha market which carried elevation was of more value and was sold more readily than

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grain not carrying elevation. Burlington does not pay any
61 allowance. Burlington delivered 7,500 cars in the fiscal year ending June 30, 1906. No allowance was made at any time by the Burlington on grain into Omaha. An allowance was made out of Omaha to meet competition. Every through line was paying elevation. The Union Pacific allowance to Peavey & Company was the basis of competition. On July 1, 1906, the
66 Burlington ceased to pay allowances on its line. A tariff has been published by the Burlington to the effect that they will assume the cost of transfer of grain from car to car to release equipment or to secure elevator weight, which is an operating expense, and does not contemplate any handling or storing of grain. If a car of grain arrives via any other line than the Burlington and the owner refuses to permit that car to go through to a destination on the Burlington; the Burlington will transfer the grain and employ any facility to do that work that is most economical.

69 An Omaha grain dealer had some 300,000 bushels of grain in his elevator on the Chicago Great Western at Omaha, the bulk of which he would route via the Burlington if they would assume the cost of transfer through the elevator and thus pay an elevation allowance, and it was declined.

77 The matter of the difference in price paid by the Nebraska-Iowa Grain Company when the grain was to go over the Union Pacific could be equalized if the Burlington would make an allowance for transferring to the Nebraska-Iowa Grain Company at their elevator at Gibson, Nebr., or the Burlington could cut the rate in any other way.

There have been other complaints. At one time during the
87 spring of 1906 all the roads were paying 1¼ cents allowance either in or out of Omaha, which is practically the same. At this time there was a complaint from Haysens Grain Company, who had a line of elevators upon the Burlington, and also had a cleaning house at Table Rock. They complained of discrimination and wanted the Burlington to pay them elevation at Table Rock, Nebr. This complaint was because the allowances were paid only at the Missouri River and not in the interior. Was a matter of location.

88 Trans-Mississippi Elevator at Council Bluffs was built in 1906, The Van Dorn at Council Bluffs in 1906, the Drodge on the North Western tracks in 1906, the Nebraska-Iowa Grain Company at Gibson in 1904, the Crowell elevator on the Northwestern tracks at Omaha in 1906, the Updyke elevator at South Omaha in 1905, the Chicago Great Western elevator in 1905, the Merriam & Holmquist elevator in 1905.

91 The difference between the amounts of grain that came into Omaha in 1904 and 1905 was not so much the consumption of

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grain at Omaha as the facilities for shipping it out of Omaha to distributing points like St. Paul, Minneapolis, Kansas City, St. Louis, and Chicago. Witness attributes the increase in the number of elevators to the strategic location of Omaha and Kansas City as serving the grain market or the grain territory west of the Missouri. Elevators are a necessity to the market at Omaha. And the transfer of grain is an advantage to the Omaha market.

The Minneapolis market is a wheat market. There is more corn and oats shipped through Omaha than wheat. If corn is shipped from the interior through to the Mississippi River via the
95 Burlington, it does not go through Omaha, but goes through Pacific Junction or Plattsburg. All corn that goes to Omaha is billed flat. All cars delivered at Omaha over the Burlington are released there without the payment of elevation. Witness was not in a position to answer generally, but for two or three days noticed that perhaps conservatively 75 per cent of the cars used by the Union Pacific handling grain was foreign equipment. These cars should be forwarded home over eastern lines.

It is the understanding that all the Missouri River lines except the Union Pacific discontinued making allowances on or about July 1, 1906. It is stated, however, that the Wabash pays 1½ cents per 100 for loading cars. The Union Pacific on June 26 extended the allowance to all elevators at Omaha, South Omaha, Council Bluffs, and Kansas City, the tariff specifying that it was for releasing of equipment.

There is more than one rate east of the Missouri River
101 now. One local rate and the other proportional rate. The proportional rate is 10¾ cents on wheat and 9¾ cents on corn to Chicago. The local rate is 15¾ cents and 14¾ cents. The proportional is limited to grain originating west of the Missouri. Knows of no reason why grain should be billed through when the through rate is the sum of the locals. Does not know that any of the roads bill through now. On the Burlington the grain coming from west of the Missouri takes the proportional rate if it is going to a destination where the proportional applies—the Mississippi or east. To do that it must have a certificate that it did come from points west
106 of the Missouri River. When the railroads were paying 1½ cents on out movements of grain, it was not allowed to Peavey & Company. It costs the Burlington two-fifths of a cent per bushel for transferring grain at their own elevator at Kansas City, based on six months' experience under ordinary conditions. It is purely a transfer house.

During the year ending June 30, 1906, Burlington hauled fifteen or sixteen thousand cars into Kansas City. If they get 25 per cent of what they haul in to haul out they are fortunate.

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113 Burlington has a transfer elevator at Kansas City, and thinks the cost of transferring the grain averages two-fifths of a cent a bushel. Will not say it is absolutely correct. Has other witness who knows.

GEORGE F. POWELL, grain business in St. Louis, Mo., under firm name of Conner Brothers & Company:

Since January 1 has handled 2,000,000 bushels. The St. Louis dealers were suffering very much by finding themselves unable to compete because there was no allowance at St. Louis for elevation transfer. The effect was to reduce the business very much. Bought grain in territory west of the Missouri River and could not bid as high as those having the allowance. They received an allowance in St. Louis in August, 1905. Then they made two bids, one on the grain that would receive elevation allowance and the other on grain that would not. Allowance was discontinued since July 1, 1906. Is at a disadvantage in buying in competition with buyers in territory on Union Pacific. They buy in the same territory and sell in the same markets. They receive an allowance of three-fourths of a cent a hundred on outgoing grain to the southeast, from the southern lines. Has no elevator. The mills consuming the grain at St. Louis receive no allowance. Are dealers and sellers and use the public elevators at St. Louis. The regular commission on the St. Louis Board of Trade is one-half of a cent for handling corn and oats and 1 cent a bushel for wheat. Would be a very prosperous year if he made an average of 1 cent a bushel on grain. Has no investment of any kind except in having office and
138 amount required to buy grain, which requires considerable investment.

The only difference it would make to the dealers at St. Louis whether they had the extra 1¼ cents' allowance, provided they were on the same standing as their competitors at St. Louis, would be that they would have to check up all expense bills and put in claims with the railroad companies. The man who owned the grain had the privilege of putting it through any elevator he chose, and on the presentation of the inbound expense bill the elevation was allowed to him. The owner paid the elevator for releasing the equipment. Does business on the Missouri Pacific, the Burlington, and Rock Island.

Q. In other words, the fact of an elevation charge at Kansas City and Omaha and along the Missouri River aided the markets of those particular places as against you at St. Louis?—A. As against St. Louis.

Q. One of the reasons was that in order to get the elevation charge or the allowance the grain had to come to the Missouri River point, it had to stop there, and it thereby got upon the market at that place before it was forwarded?—A. I do not know that it had to stop there,

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but by reason of the elevator allowance they were enabled to force it to stop there.

Q. Whether it did or not, I am assuming that if the elevator allowance was made in good faith it inured to the benefit of Kansas City and Omaha and St. Joe markets, because it required the grain stopping there; that is true?—A. Well, I should say so.

The dealer paid the elevator the regular amount for handling the grain and the railroad company paid him a regular amount of 1¼ cents. This allowance was regularly published in a tariff. Omaha and Kansas City have an advantage over St. Louis in being able to sell to the Minneapolis or St. Paul market.

142 Regards the elevation allowance as the equivalent of a reduction in the rate to that extent.

The CHAIRMAN. If the through rates from a point of origin to any given destination are fairly adjusted as between the Omaha or Kansas City gateway, on the one hand, and the St. Louis gateway, on the other, then the granting of an allowance at Kansas City and Omaha and refusing it at St. Louis would operate, as you say, to make the rate higher through St. Louis by a cent and a quarter?—A. Yes, sir; I think that is very obvious, that it would influence the movement of grain through Omaha and Kansas City rather than through St. Louis.

Thinks that grain would not receive the allowance at St. Louis that had received an allowance at Omaha, because on one or two occasions the railroads sent back claims and cut out certain cars which they said had passed through an elevator at Omaha and had received the allowance. Bids are so made that, considering transfer charges and transportation charges, a profit can be made between the cost price and the selling price.

E. M. F. LEFLANG; in the grain business at Lexington, Nebr.,
150 and is also a miller. Lexington is 230 miles west of Omaha on the Union Pacific. Has another elevator at Cozad, operated as Platt Grain Company, about 15 miles west of Lexington, and also has elevator at Willow, 20 miles west. Also has an elevator at Columbus and is building two at Polk and Hordville. Buys about 700,000 bushels a year at two places, St. Joe and Grand Island. Mills wheat and ships corn west. Ships it west because that is the only way they can make anything on it, because conditions are such that they can not compete with the Omaha Elevator Company. Have been in business twenty-one years. Buys grain and stops it in transit at Lexington for the purpose of cleaning it. Then it is loaded into foreign cars that go through to destination. As he is allowed nothing for transfer, it costs a cent and a quarter per hundered pounds more than it does the Omaha Elevator Company.

Operates under the name of the Lexington Mill and Elevation Company. There are two other elevators at Lexington, but the Lexington company gets a large percentage of the business.

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At Cozad, besides the Platt Grain Company, there are two other firms and the Omaha Elevator Company, but he is "getting along and getting his full proportion of the business."

Q. You made these arrangements with the Union Pacific to build elevators and go into the grain business at those two places (Polk and Hordville on Union Pacific)?—A. Yes, sir.

Q. You did this in view of your past experience and the fact of the allowance at Omaha?—A. That is exactly what we are doing.

Q. You have done this, notwithstanding this allowance at Omaha, making these extensions and getting more all the time?—A. Yes, sir.

Ships on the through rate with the privilege of stopping for cleaning in transit at Lexington. Ships in foreign cars, because he does not like to have grain transferred at Omaha or Council Bluffs. There is some loss in transferring. Has no trouble in getting foreign
173 cars. Flour goes on at the balance of the through rate. Thinks wheat cleaned and mixed is worth 2 cents a bushel more than the grain as it comes from the country. Unloads and reloads about 480 cars a year. Cost of unloading grain into elevator, aside from fixed expenses that must be paid whether unloaded any grain or not, is about 75 cents a car.

Q. If your elevator is also getting an elevator allowance and is also a dealer, and he goes to buy a car of wheat, as against an independent dealer, how much advantage has he got, considering the fact that he has fixed expenses of running his elevator anyway?—A. His profit is about $7.50.

Lexington is 230 miles west of Omaha. Burlington has a line south of Lexington about 12 miles. Between the two lines is grain-growing region. Thinks prices are higher on the Burlington.

A good deal of the grain is sold in Omaha. Dealers who buy the grain in Omaha give directions how to ship it.

Grind about 1,150 barrels of flour a day. The elevator at Cozad is primarily for the purpose of supplying grain for the mill.

A miller enjoys a profit in his milling business and a grain dealer merely buys and sells the grain and must figure his profit on this transaction.

Q. Does not that make competition between the mill and the man who merely buys the wheat to sell it again; that ordinarily makes a higher price and worse competition than any other place for the man who is merely a grain merchant.—A. As I said, the freight rate enters into the matter largely, whatever is paid. The more elevation charges between Lexington and Liverpool the worse it is for the American miller.

Ground at Lexington the previous year about 250,000 bushels of wheat.

GEORGE C. THOMPSON, grain commission business, Omaha. Before he entered the grain business he was employed by the Union
193 Pacific at Omaha in the freight depot. In his commission business he is enabled by the elevator allowance to sell the grain for shippers on the Union Pacific at a higher rate than that of others—one-half to three-fourths of a cent difference per bushel. This grain is consigned to the commission merchants to be sold on the exchange. The grain is entitled to the 1½ cents allowance. Does not know whether the shippers over the Union Pacific pay more to the farmer. The allowance does not affect his business, but the business of the shippers. This condition has existed since the other roads ceased to pay allowances.

C. F. DAVIS, grain business at Omaha for two and one-half
219 years. Has been in the business elsewhere twenty years. Prior to coming to Omaha was in business in northwest Missouri and western Iowa. Company owns 12 elevators in the country and terminal in Omaha. Company is the Nebraska-Iowa Grain Company. Rated as 125,000-bushel terminal. Handled about 1,500 cars for the year ending May 1, 1906. Considers terminal elevator necessary to the business, because of advantage in mixing, etc., and in estimating and weighing grain. There are a number of advantages in having a terminal house in connection with a line of country houses. Chief among these advantages is the mixing of low-grade and high-grade wheat to make a uniform test or uniform grade of good merchantable wheat. Another feature is in estimating and weighing grain. Grain sent from country to outside markets has to be sold on the weights of the market in which it is sold, and the Omaha weights are considered better, because it relieves the shipper from standing expense of shrinkage. If have official weights in Omaha, enables shipper to better settle differences, whereas if only had country weights they are not reliable. Has paid more for grain shipped over Union Pacific than grain shipped over other lines. Has been receiving the allowance at his elevator since June, 1906. Gets no allowance from other elevators. Formerly received allowance from other roads when grain went out. There is no difference in the service performed when the allowance is made; the grain is unloaded just the same. Has been familiar with operation of terminal only two years. Burlington and Union Pacific are competing lines, and grain in competition would be a considerable proportion of the grain over the State.

Has promise of allowance from the Union Pacific, but as yet has had nothing from them. Has been manager of the company since July 15, 1906. Had some experience before in the same company.

First experience with terminal elevator has been last few months
Commenced bidding higher at David City August 11, 1906,
238 and continued seven days, after which Mr. Spens, of the Burlington, called him up. Up to August 10 had a cut rate and shipped all the grain he could buy. On August 11 the elevator was without business practically and raised the bid to get grain to do business with. The Union Pacific grain was worth more than Burlington grain, so he raised the price on that. Bought, perhaps, forty to fifty thousand bushels at the increased price. Has made several purchases of grain on the Union Pacific at higher prices than on the Burlington. Is inclined to think elevator allowance gives farmer more for his grain.

The CHAIRMAN. Now, if this allowance by the Union Pacific operates to give the producer more for his grain, why is it not a good thing?—A. Well, possibly it is.

Q. Why would it not be a good thing if all made the allowance?—A. That might be true, too.

In July Burlington put in a cut rate, and when that rate was discontinued the price of grain to shippers was reduced accordingly.

The elevator allowance is a slight advantage to the Omaha elevator in that it protects the Omaha elevator man in bidding in Nebraska, which is a little higher possibly than Chicago or St. Louis markets can pay for that grain, while if it were a cut rate St. Louis and Chicago would bid as high as he could and he would receive nothing for handling the grain through his elevators. Experience is short in the grain business, and don't know that his opinion is worth much, "but it certainly places our little company at a disadvantage to have any other elevator in Omaha receive 1¼ cents a hundred on their line of grain off the Union Pacific road, owing to the fact—we will take the specific case in the question of the Omaha Elevator Company. They have something like 70 elevators on the Union Pacific road and bid all the roads in Nebraska, as I understand it. After their grain has arrived in Council Bluffs and is unloaded in their terminal ho[illegible] I should say that 80 per cent of it has paid 1¼ cents unloading ch[illegible]ge. After all the grain that I buy at my 10 country stations and the grain that I buy from dealers on all the roads in Nebraska—after my grain gets to my terminal house and is unloaded there is 20 per cent of it has come off the Union Pacific road and on which I have received 1¼ cents a hundred. In other words, an elevator situated as the Omaha elevator is at this time owns their grain about 1 cent per hundred cheaper than I own mine. We buy in the same territory in competioin and we sell in the same market in competition. The inference is plain." If the Chicago elevator were paid the same allowance the advantage would disappear.

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WILLIAM H. SUFFERN, in grain and corn business at Decatur, Ill., and desires to be heard before the Commission. Has
266 country elevators on the Illinois Central and Wabash. Grinds 10,000 bushels of corn per day of twenty-four hours. Found that the granting of allowances on corn drove him out of the export corn business.

268 I export corn via New Orleans. The allowances that I have referred to were made, upon my best information, to Harris, Scoten & Company, at Chicago, who had elevator D leased from the Central Elevator Company of New Orleans, which I am informed is a company in which the Illinois Central officials are interested, and the West Wego elevator, which is the Frisco elevator at New Orleans, which was leased to the J. Rosenbaum Grain Company of Chicago. I was informed that the Illinois Central rate was 12 cents a hundred pounds to New Orleans; that was the published tariff rate to New Orleans for export, which included the fobbing charge and fifteen days' storage in the elevator. And I was informed that 2 cents of that went to the company who had the elevator leased, the export elevator, and 10 cents of it went to the railroad company. I was unable to compete with the handicap of the elevation charge of 2 cents a hundred pounds in European markets and in fobbing grain, putting it on the vessel at New Orleans. I was informed that anybody down there who was outside of the elevator lease was unable to do the business. I know that grain was confined to those two firms who had these elevators.

269 The elevation charge on the Ohio River shuts out everybody who does not receive the elevation charge of three-fourths of a cent a hundred pounds. Attempted to do business via the Ohio River gateway at Cairo and was unable to compete.

Q. Will you state whether, in your opinion, country elevators or a line of country elevators that has no connection with a terminal receiving such an allowance can do business in opposition to a line having a terminal with an allowance?—A. If they would cultivate the friendship of the line house which has the allowance, they can; otherwise they can not. I mean that you must be on a friendly basis with the line house; that you are handicapped to the extent of the elevation, and if you undertake to force things in a business way you are in their power, and they could simply put you out of business.

274 There was no charge to the shipper for loading grain through the elevator into ships at New Orleans, but a dealer in grain leased an elevator and was paid 2 cents for all grain that went through. This year the conditions have been changed so that all shippers will be treated alike. Witness expects to go back into the business. Considers 1 cent a hundred a reasonable charge for receiving and

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shipping grain from an elevator, including fifteen to twenty days' storage. When an elevator is operated as these are, they do nothing but elevate the grain and load it out; do not clean it; do not grade it; if they dry it they charge for that.

279 There would be no objection to a charge of a cent a hundred pounds, provided the work was done by a strictly public house, and everybody was placed upon the same basis, and the elevator did not deal in grain at the same time.

281 Began grinding corn eight years ago and made three increases since that time. Began corn export business about eight years ago in a small, conservative way, because they were not familiar with the business. This business increased until he ran up against the allowance proposition, which was three or four years ago.

At New Orleans there is a difference in color of grade No. 3 of corn which amounts to about 1 cent a bushel, and in shipping through the elevator of a rival anyone shipping in the best corn might get corn worth 1 cent a bushel less.

J. C. LINCOLN, commissioner of the Merchants' Exchange, Traffic Bureau of St. Louis, since May 1, 1906:

299 Formerly with the Missouri Pacific as assistant freight traffic manager. Had been working for a railroad since 1876.

301 The first public appearance of the allowance was in connection with the allowance made by the Union Pacific to Peavey & Company under what is known as "the Peavey contract." That allowance was made at Omaha and Kansas City. The railroads operating in the West, with the exception of the Union Pacific, were not making elevator allowances. Some of the lines were, so it is believed, making an allowance without publication shortly after the Peavey contract became public property. The elevator allowances were made public by all lines, about 1903, and were made to the elevator interests either as an unloading charge or as a loading charge for the purpose of meeting the allowance made by the Union Pacific, and originally were confined practically to the elevators operated by line operators. So far as elevator allowance made by the Union Pacific was concerned, the effect was not felt directly by the railroads in competition, because in bidding for grain in the country the allowance was not used.

303 When competitive conditions became keen, the operators of line elevators on the other roads claimed that in order to be placed on a parity with the operators on the Union Pacific they should have the benefit of the allowance. Later came the demand for allowance at other points. Can not see that Peavey & Company perform any different service than other elevators receiving grain, or any consignee handling grain or any other commodity.

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307 This allowance makes a discrimination between localities such as Chicago and St. Louis on the one hand and Omaha and Kansas City on the other hand. When the allowance was made at St. Louis, the business of that city increased, because the dealers could then compete with the dealers at Omaha and Kansas City.

Cars are not unloaded any more rapidly when the allowance is made than before.

323 I think the shipper should bear the cost of transferring his own grain through his own house, and the shipper should bear the cost of unloading the grain; the receivers, when it gets to destination, and shipments * * * as through shipments, when they arrive at junction point with the connecting line, the road originating that and not desiring to let their car go through, then the carrier should provide for some means of transferring that car, and it should be at the expense of the carrier. This has been necessary since the instigation of the railroad and grain business. Take a shipment originating on Union Pacific and coming to Kansas City and then over the Chicago & Alton sent through to Chicago, the Union Pacific has a right to demand and wants its own equipment back at Kansas City and the carrier should pay for the transfer of that grain.

The CHAIRMAN. Pardon me. He means not a service to the shipper. There is no service performed to the shipper, but to the carrier.

Mr. HAGERMAN. I am dealing with the abstract question that there was a service.

Mr. LINCOLN. Certainly, and the carrier should perform that service.

Mr. HAGERMAN. That service ought to be performed by the railroad company?

Mr. LINCOLN. That through service; yes, sir.

"If there is no connection between the owner of the grain and the party to whom the allowance is given for the transfer it would not cut any figure and the roads themselves would have that done as cheaply as possible."

Witness is of opinion that the transfer at Omaha and Kansas City is necessary both to the railroad company and to the benefit of the grain business, which thereby affected the price of the grain; the objection would not stand if the allowance were paid on through shipments, as it should be, and not paid as an unloading charge. Claims that the owner of grain should not be allowed a compensation for unloading it at his elevator when that property has reached its destination and is to be resold and distributed somewhere else.

335 The CHAIRMAN. If that grain comes into Omaha, coming there to be consigned to any destination other than Omaha,

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so far as the origin of this shipment is concerned it is a terminal point and the duty would be upon the consignee to handle his own grain?—A. Exactly.

The CHAIRMAN. And the carrier would have no right, therefore, to pay for the cost of unloading that grain to the shipper?—A. Absolutely none, in my opinion. There are a great many, aye, thousands of farmers' elevators in Kansas and Nebraska. Can not say that when he was with Missouri Pacific he received any complaints from farmers' elevators. Received very few complaints from inland towns. Received complaints from the Hall-Baker Grain Company, from milling interests, and from men originating grain out near Little Rock, and from St. Louis grain men.

343 Not trying to hold out that the equipment should not be released and for the reason they have the grain transferred; if the conditions are such that in accepting that property they will have to transfer it, they should pay for it. Found out while with Missouri Pacific that transfer facilities were necessary at Kansas City and all terminal points, for handling freight. Found that all lines had to provide transfer facilities for handling. It was necessary for the Missouri Pacific to have transfer facilities for the prompt handling of business and the release of cars, on through business. After destruction of Merchants' elevator at Kansas City had the shovel method from car to car and found there was absolutely a loss of grain, a delay to cars, and great deal of dissatisfaction about the transfer of property in periods of congestion. It was inadequate and unsatisfactory also in release of equipment. Consequences of using a small transfer (shovel method) made it expensive because of detention of cars and loss of grain. There is a detention of cars at certain times when you employ the shovel transfer that might make your equipment more valuable.

361 The payment of the allowance would result in the farmer receiving a higher price for his grain, but the consumer would in the end have to pay the extra price.

358 If the allowance was made by all the railroads to all elevators, there would be no discrimination between elevators "but it would be the rankest kind of discrimination against the man who does not own and operate an elevator and against a miller who performs the same service and who does not get a compensation for it; that is my opinion."

372 The Missouri Pacific is the second or third largest carrier of grain into Kansas City. Practically all the grain is local. There is very little through grain. Through grain on the Missouri Pacific does not pass through Kansas City. Thinks it would be unnecessary for the railroads to pay elevators for unloading grain, because it would be unloaded anyway. Railways have built eleva-

tors at Kansas City through the necessity of competition. They build them when they can not get some one else to build them.

379 Q. Now, in regard to building up these elevators that have been put in at Kansas City by the different roads; you say that that was forced upon the railway companies as a matter of competition? Kansas City being a market, too, the roads began to compete for the business that came into that market town, and unless elevator facilities were provided by the different shippers who handled grain to that market, in order to handle it not as a transfer proposition, but as a grain proposition, the different roads competing for the business were forced to put up these elevators?—A. Absolutely no question about it.

If those elevators had been erected as a mere transfer proposition, they would not have been of the same construction and not so large. A transfer house can be handled much more economically than elevators. Is informed that the transfer charge at St. Louis is a half a cent a bushel where they do not have to hold any grain.

384 At the Missouri River they have abolished the elevator allowances, but they will allow one-half cent a hundred on through shipments of grain when necessary to transfer from one car to another, which is published in a tariff.

The strong lines on a railroad controlled the trade and got the business for the railroad. That practice does not continue now. They like to do business with one railroad, like to assemble their grain from one railroad, and the economic operation along one railroad for the purpose of inspection, auditing, etc.

389 Q. And the strong reason for building along one line of road to the exclusion of all others was the rebate concession; is that your idea?—A. Yes; owing to those concessions, special allowances.

JOHN J. STREAM, grain business in Chicago:

395 Has three terminal elevators of capacity of 4,500,000 bushels. South Chicago elevators C, D, and C annex, located on the Rock Island, Baltimore & Ohio, and Lake Shore. In this business for three years. Handles about 15,000,000 or 20,000,000 bushels a year. Allowance at Omaha operates to his detriment in this way: "I am buying, or trying to buy, grain in Nebraska on all lines. I am offering that same grain to the consuming territory in the East. The grain that I buy in Nebraska is transferred and reconsigned to Chicago. The gentlemen who have this 1¼-cent allowance also buy grain in Nebraska and they compete with me in the East. They have that advantage over me at all times." A cent a bushel is a very large margin. Is receiving no allowance. A car-to-car transfer

400 charge in Chicago is one-fourth of a cent a bushel. There have been cases where double allowances were made on grain originating west of the Missouri River, but the Great Western reduced the

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rate to meet that. Grain markets on the Missouri River have advantage over Chicago, in that they can reach markets in the South, North, or West, according to which is the best. Chicago has the advantage of a large local consumption. Without the allowance would consider he was on a parity with the Missouri River market in reaching the eastern market. The effect of these allowances are that they permit the Missouri River grain dealer, or whoever gets the allowance, to undersell the Chicago dealer in the eastern market.

Has been in business about twenty-five years. The company is operated under the name of the South Chicago Elevator Com-
404 pany, none of the stock of which is owned by a railroad. Has no country elevators. The elevators are leased from the Chicago & Rock Island Elevator Company. Although president of the company, knows nothing of the leasing of the elevators.

The effect of the elevator allowance is that Peavey & Company are able to bid more in the West and undersell in the East. Has information from his representative in Omaha, put there recently, that Peavey & Company have been bidding more for grain on the line of the Union Pacific than for other elevator business. If Peavey & Company were to overbid in the fields, it would drive out the terminal men, but not the local men, because Peavey & Company buy of the local man. Can not say what effect it would have upon country elevators. Thinks 1 cent would be a good profit for handling grain.

Peavey & Company do not get allowance of 1¼ cents at Chicago.
429 Has the grain which is purchased for him in Nebraska transferred through the Rock Island elevator at Council Bluffs, which is operated by the railroad. This service has been rendered free since September 1, 1906. Some of his grain was transferred by the Van Dorn Elevator Company because the Omaha Grain Exchange refused to inspect or issue certificates of weight on grain going through the Rock Island elevator. The Omaha Grain Exchange afterwards withdrew the privilege of having the grain inspected in the Van Dorn elevator, so he now uses his own certificates of inspection and weight.

432 As the elevators of the South Chicago Elevator Company are situated on the Rock Island, if the grain enters Chicago on any other than the Rock Island it would necessitate the payment of a switching charge, so all grain which comes into Omaha over other lines than the Rock Island is transferred to that company. The free transfer is open to all shippers who ship over that line. The identity of the grain is preserved. The Chicago Great Western and the North Western absorb the switching charge at Chicago, but delivery is so uncertain that the grain can not be properly handled at all times. In buying grain in Nebraska, deals with the local grain dealer, not with the farmer or producer. Sometimes buys from the Omaha dealer. These purchases are in competition with the Omaha Elevator Company.

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Counselman incorporated the South Chicago Elevator Company in the sum of $665,000 and built these elevators. He owned practically all the stock. Upon his death the South Chicago Elevator Company sold the elevators to the Chicago & Rock Island Elevator Company, who leased them to the South Chicago Elevator Company. The $700,000 received for the elevators was turned over to the estate of Counselman, and the South Chicago Elevator Company continued under the capitalization of $665,000.

451 Has transferred grain through his elevator for one-fourth of a cent a bushel. The most of it was a year and a half previous to the hearing. Now does very little when elevators of Baltimore & Ohio and Lake Shore are crowded. This rate of one-fourth of a cent was established by the eastern roads. The regular public elevators charge three-fourths of a cent a bushel with ten days storage, which is the maximum charge allowed by law. Transfer can not be made through public house. Therefore the transferring is done through private houses. Three-fourths of a cent is a mere paper rate and the business is done for one-fourth of a cent a bushel. In the public elevator it is not a car-to-car transfer; the identity of the grain is not preserved; grain goes into a bin and an equivalent amount of grain of a similar grade is sent out. In buying grain one-fourth, or even one-eighth, of a cent a bushel higher bid would get the grain.

471 Q. You are doing buisness in competition with the Omaha Elevator Company?—A. Yes, sir.

Q. If they have $600,000 invested in their terminal houses and country houses, through which and by means of which they are doing this business, and it should turn out that you have the use of a plant to do your business worth $1,000,000, in which you have no money invested and for which you pay no rent, that would give you quite a decided advantage over them, would it not?—A. Yes, sir; that is possible.

460 I understand that the Omaha dealers have boycotted the Rock Island because of the Rock Island putting in some rates to Memphis, via Kansas City, from southern Nebraska, which, as I understand, is the natural outlet for Memphis, and Kansas City is the gateway, and Omaha claims it is not fair to Omaha to deprive them of the trade of that territory. The Omaha exchange will not grade grain of witness. Omaha Grain Exchange inspect only the grain for members. Witness is not a member, but has made application for his manager.

S. McMURRAY, Wood River, Nebr.

473 Buyer of grain; in this business about fourteen years. Worked for the Omaha Elevator Company eleven years as agent at Wood River. Omaha Elevator Company had two elevators

there at that time and witness could not get along with the other agent and resigned. Went into business for himself, and when he started to buy grain wheat went up 5 cents and corn and oats 2 cents. The price went up at only Wood River, but not in the surrounding places that I know of. Mr. Peck, manager of the Omaha company, tried to get him to go back, and Mr. Paterson, auditor of the Omaha company, said that if witness bought grain they would "break his back."

Q. Do you know what he said?—A. Said they would be forced to buck me. When I left I guess we were pretty good friends. Most of the grain witness has bought he has had to hold in the warehouse until the market went up. At Shelton, which is a station 8 miles west of Wood River, wheat last year was 5 cents less than it was at Wood River. Shelton merchants wanted him to come up there and buy grain and witness took the matter up with the assistant general freight agent of the Union Pacific, Mr. Lane, but he would not agree to furnish cars at Shelton. This year he was promised cars, so went to Shelton part of the time. When he was at Shelton the market was higher there, and when he was at Wood River the market was higher there. Sells his grain to the Exchange Grain Company of Omaha. During the first five weeks of his business he could not get any cars and during that time the Omaha Elevator Company got 42 cars. After he began getting cars, it was easier to get them going west than east.

481 At another time waited three weeks and could not get cars, while other elevators at the same place received 31 cars. During this time one foreign empty car, Cotton Belt car, was shipped out empty.

Has a claim in for a site on the right of way of the Union Pacific for building an elevator. One of his warehouses, a flat warehouse, is on the right of way, but this is not an elevator and the shovel and broom method of loading is used. Thinks the entire expense of running an elevator at Wood River would be covered by 1¼ cents allowance. Is brother-in-law of Mr. Jacquith, who was also formerly with the Omaha Elevator Company, but quit.

485 Formerly a Mr. Mitchell owned an elevator at Wood River, but in a year or two the Omaha Elevator Company had trouble with him and crowded him out and he sold to George S. Clayton, with whom the Omaha Elevator Company also had trouble, and built another elevator and "we played two pluck one until he sold out." During all this time Mr. Hoard had an elevator at Wood River, which was in operation all the time. It was not commonly known that both of these elevators belonged to the Omaha Elevator Company. Witness was agent for one of these elevators, and when he started in Mr. Mitchell, being an old resident, got most of the

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business, and so had to do something to get even. Situation would now be harmonious if witness was not there. Thinks about 80 per cent of cars furnished him are foreign cars. Westbound stuff is mostly Union Pacific cars.

514 P. K. WINTHER, in grain business at Eustis, Nebr., on the Chicago, Burlington & Quincy:

The nearest point on the Union Pacific to Eustis is Cozad. Was at first engaged in business at Calloway, where he bought grain as a track buyer. Did not have an elevator. Omaha Elevator Company has an elevator at Calloway. Was unable to do profitable business at Calloway. While he was buying grain at Calloway the market price was always a little higher than at the surrounding towns.

518 Now has an elevator at Eustis with a capacity of 12,000 bushels. Last year bought about 125,000 bushels. Sold some at Kansas City and some at Omaha and some to mills. Received no elevator allowance. Cost of running elevator is about $5 per day, including rent. Elevator allowance, if he had it, would pay two-thirds of the cost of running the elevator. Omaha Elevator Company have elevator at Cozad. Expects the price is always a little higher than at Eustis. Cozad is about 15 miles off. The grain between Cozad and Eustis is about divided between the two towns. The grain would go to Cozad but for the fact that there is a better road to Eustis.

WILLIAM S. WARREN, commission business in Chicago:

533 There are not over 20 or 25 commission men who have no elevators in Chicago. Fifteen or twenty years ago there were from 150 to 200 commission men. Accounts for it in this way: The favors granted to elevator concerns have eliminated the consigning business. Only knows about allowances by hearsay. Now buys grain only in Iowa. Formerly operated about 70 stations in Kansas and Nebraska. Has never been intimately connected with the management of that part of the business, but sold out that part of the business because it ceased to be profitable, because other people were getting rates that they were not. Does not know in what form. Allowances acted to their disadvantage in buying. Dealers receiving allowance have no advantage over witness in selling that he knows of. These allowances are a disadvantage to Chicago as compared with points on the Missouri River. Points on the Missouri River had some

537 advantages other than the allowance. Sold the plant for operating in Kansas and Nebraska five years previous, and knows nothing of the conditions at the time of this testimony.

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E. O. MOFFATT, has been in the grain business about sixteen years at Kansas City.

541 Business handled in each year ranged from 500,000 to 2,000,000 or 3,000,000 bushels. Has no elevator, but operates through elevators of other grain dealers. Had received several hundred cars a year over the Union Pacific. Up to June 27, 1906, had made no claim for the allowance for releasing their cars. Has never received any money yet. It was understood that this allowance was confined to Peavey & Company. Has a statement of part of the cars that have been handled over the Union Pacific since the tariff was issued in June, 1906, granting the allowance privilege to other elevators than Peavey & Company. Stopped making out statements because there were no payments being made. Presented claim to G. M. Curtis, agent of the Union Pacific. After three weeks he called up the agent and was told that the claim had been forwarded to Omaha and he would hear from them in due course. After addressing communications to the officers, no reply was ever received. The claim was presented to the Union Pacific six weeks previous to the hearing. No objection was made to the claim on the ground that witness was not an elevator man. Understands other grain buyers similar to himself have filed claims which are in process of adjustment.

555 Grain entering Kansas City is considered a terminal proposition no matter whether it originates on the Union Pacific or any through line. Eastern lines are making transfer without charge to the shipper, provided the grain goes over their line.

559 During the time that Peavey & Company were receiving the allowance and other elevators were not, generally speaking, grain over the Union Pacific was commanding a higher price on the Kansas City Board of Trade. There were times when it did not.

Q. Whenever Peavey is on the floor, that condition obtains uniformly, doesn't it; when he is on the floor as a buyer?—A. When he is buying grain; yes, sir.

Peavey & Company has always been willing to sell to witness. At times has purchased grain from Peavey & Company, and has bid for their grain when others have made the same bid, and he has got it by offering to allow the grain to go through their elevator. When a car is set at an elevator there is no more promptness at the Peavey elevator than at any other. At certain times the other elevators do the service as quickly as Peavey.

571 Would say that car-to-car transfer at Kansas City would be worth one-half cent a hundred. It would be an advantage to the market at Kansas City to have storage furnished for grain. Storage of grain might be worth one-half cent more. Has his cars

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transferred on the Burlington, Wabash, and Santa Fe; the last few months mostly on the Santa Fe. These railroads transfer free except the Frisco, which charges either half a cent a hundred or half a cent a bushel. It is an unreasonable charge. Thinks roads ought to be required to make transfer without cost to owner. Under the circular, the claim of witness above mentioned is based on the fact that the grain came over the Union Pacific, even though he paid no charge for transferring it. Santa Fe does its own transferring in its own elevator, as does the Burlington. The Santa Fe elevator is one of about a million bushels' capacity. The Burlington is a very small one, which has no storage capacity.

The Burlington is constructing an elevator of about a million bushels. Rock Island also transfers without charge to the shipper, through an elevator which may belong to Rosenbaum, with a capacity of 1,000,000 bushels. Wabash has an elevator of 150,000 bushels, which answers all their requirements. Chicago & Alton has an elevator of about 150,000 bushels; Milwaukee & St. Paul of about a million bushels; Chicago Great Western of about 500,000 bushels, which they are talking of enlarging. Frisco has an elevator of half a million capacity. Missouri Pacific has an elevator of a million bushels' capacity. Railroads had to have elevators or get some one else to transfer.

591 Private elevators charge one-fourth of a cent, three-eighths of a cent, and sometimes three-fourths of a cent for car-to-car transfer, not including storage. Other railroad companies at one time paid the allowance in addition to doing the service. They have discontinued entirely.

Objection is not to the allowance so much as to the allowance to one firm only. If everybody was permitted to render the service, thinks allowance would be good thing. Considers that the Peavey elevator is not for the purpose of transferring, but for storage.

602 There is a reconsignment charge made by through lines when grain which comes in over their line goes out over the line of another carrier.

616 The allowance for transfer on a through shipment would not affect the market, but if it were consigned to a terminal market the elevation allowance would benefit the market. Thinks the railroad should pay when the grain is transferred from one road to another in a through shipment.

Q. Suppose the grain is stopped and delivered there to consignee, who puts it in his elevator and treats it for the market and has an original profit in view; then when shipped out should the railroad pay the loading?—A. As a strictly business proposition, I should say "No."

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Although witness has paid at times prices higher than others on the market were paying, he has never paid as much as he might have had he been receiving the 1¼ cents allowance.

620 On the grain on which claim was made for the allowance the understanding of Mr. Moffatt is "that the elevator that has done the work will do that work in order to get the shipment out. They will do that free. And the fact that the Union Pacific offered this 1¼ cents as a us to anyone who would get their cars back to them within forty-eight hours entitles me to it, because I paid more for the grain," when it came in over the Union Pacific, thinking that he would get the allowance.

JOHN KELLEY, flour miller at Kansas City about seven years; prior to that engaged in business at Leavenworth about twenty years:

628 Capacity of the mill is about 2,000 barrels per day. In connection with the business has elevator of about 350,000 bushels, with an unloading capacity of about 40 cars per day. Has never received any allowance from Union Pacific or any other railway company for releasing equipment. No allowance to his knowledge has ever been allowed to millers at Kansas City. The fact that allowances are made to certain grain shippers and not to millers has operated to the great disadvantage of millers at Kansas City. If the allowance is made, it inures to the benefit of a miller somewhere. He is able to get his grain cheaper. The prices both on the floor of the Kansas City Board of Trade and in the country are higher on the Union Pacific because of the advantage to Peavey & Company. Formerly did a large business on the Union Pacific, but on account of the allowance the business has dwindled down until the business is now very small.

635 Bought some grain of a party in the country on the Union Pacific lines and could not get cars to have it shipped in over the Union Pacific, over which route the owner preferred to
637 ship it, but did obtain cars from the Santa Fe. Elevator is situated at East Kansas City, having switching connections with the Suburban Belt, which connects with the Union Pacific Transfer. Union Pacific makes a charge for switching cars to the elevator, although there is direct switch connection. If a car was set in early in the morning of to-day, it would probably reach our mill this evening. It would be unloaded to-morrow morning, and then be ready for switching out to-morrow the empties, so that it would be returned to the railroad within forty-eight hours if the railroads did their duty bringing it in and taking it out. The same service is performed as at the transfer elevators, and so far as the

release of equipment of the Union Pacific is concerned the same benefit accrues, although the grain is ground into flour before it is forwarded. The elevator was built for the purpose of doing an export grain business in connection with the flour business, but it was impossible to compete with the favored shippers and the grain business was not carried on. Has no milling-in-transit privilege. Has never
643 received an allowance from any railroad company.

"The switching is added to the through rate. In other words, they claim if it was not for absorbing the terminals the rate would be less than it actually is, on account of the terminals they absorb into the through rate." Has had no more disadvantages since prior to July, at which time the other lines ceased to pay allowances. This disadvantage is not confined to the Union Pacific, but exists in regard to business on all the roads. However, has been put to more disadvantages over the Union Pacific than over other roads. Might possibly have been able to carry on the grain business if his elevator had been on a main line. Built his elevator in 1898.
657 Found he could not do grain business about January, 1900. Since 1900 has increased the capacity of his milling business 150,000 bushels. Thinks all would be placed on a parity if the allowance for transfer were eliminated altogether.

GUY CHASE, St. Paul, employed in the office of Mr. Severance, attorney for the Chicago Great Western.

Made examinations of entries in book of the Omaha Elevator Company marked "Billing Book O," produced by Mr. Peck, general manager of the Omaha Elevator Company. Purports to be entries of car numbers and initials, but are not complete. Book shows date of receipt of cars of different kinds of grain, the initials of the cars, and numbers; the date unloaded; the date of the bill of lading; date the bill of lading was received; the consignor; the station and progressive number; the freight paid and the weight; but does not show weight of shipments out, nor, except in a few instances, the car initials out. Shows what purport to be car numbers out, but does not show weights or destination. Dates of shipments out are very much mixed up; not in consecutive order. It is not possible to make a check and determine the cars coming in that were used in shipping out. The following is a statement made up from the book by Mr. Chase, which is included in the testimony in which he has put Union Pacific cars received in one column and foreign cars in another column.

Data taken from billing book "O" of the Omaha Grain Company, covering the period from July 5, 1905, to July 5, 1906.

	Cars of grain received.			
	Total number of cars received.	U. P., S. P., O. S. L., and O. R. & N.	All others.	Cars of which no initials were given in the book.
Corn	4,949	1,539	3,392	15
Oats	1,447	487	959	1
Wheat	1,390	687	710	2
Rye	87	36	51	.....
Barley	84	38	46	.....
Grain transferred	27	10	17	.....
Total	7,984	2,788	5,175	21
Percentages	100	34.91	64.82	0.27

H. GOWER, freight traffic manager Rock Island road.

687 Since the former decision of the Commission, the Rock Island made a contract with J. Rosenbaum for the construction and operation of an elevator at Kansas City. Made in July, 1904. Rock Island pays Rosenbaum 1¼ cents a hundred for transfer of grain of that company and $3.50 on other grain transferred at request of Rock Island. Contract was forced upon the Rock Island by competition. Could not get anyone to build elevator unless allowance was paid. Rosenbaum occupies a position on the Rock Island similar to that of Peavey & Company on the Union Pacific, having country elevators. This contract remained in force until July, 1906. Grain is now transferred through the elevator when desired at $3.50 per car. Under this contract the land was furnished by the Rock Island; the elevator was built by Rosenbaum, and the Rock Island afterwards paid the cost and $5,000 for his services, the elevator belonging to the Rock Island and leased to Rosenbaum. Rosenbaum is a grain and live-stock dealer. Has elevators also at Chicago. Rock Island also has contracts with Rosenbaum regarding business at Chicago. Reaffirms testimony in former hearing that Rock Island did not care to build its own elevators.

720 The contract reads, "In consideration of prompt release of equipment," etc. The contract is in operation to-day as it is written, except that the Rock Island does not pay anything for elevation, only for transfer. This change was by oral understanding between Mr. Biddle and the Rosenbaum Grain Company. Before the erection of the elevator mentioned in the contract, the Rock Island had a small elevator at Kansas City of about 40,000 bushels. The elevator was built because of the necessity of the Rock Island to compete with everybody.

Q. Well, particularly with them (Peavey), because they were getting this 1¼ allowance; that is true?—A. The necessity was that we

had to have elevator capacity to handle the business whether Peavey was there or not. We had to have an elevator there to do the business.

Q. You had been doing business a long time without that elevator?—A. Yes; but at a disadvantage all the time.

Q. The necessity for this 1¼ cents allowance was the fact that it was given by the Union Pacific?—A. That was what the parties put to us—that they could not build and operate an elevator unless they had this 1¼ cents.

Q. Because these other people were getting it?—A. That was their argument.

Mr. BALDWIN. I understood you to say that you testified positively that you had to have these elevator facilities and transfer facilities at Kansas City. The only talk about the Peavey allowance of 1¼ cents in your whole testimony, where you testified that your agent down there had written that the parties making the proposition of building an elevator wanted 1¼ cents because Peavey & Company had it in their contract. I am asking you if that is not the true fact about it.—A. Our necessities were for an elevator in the first place. We wanted an elevator there. The necessity for the elevator per se was on account of the other roads having elevators. The necessity for making a contract paying 1¼ cents was on account of other roads paying 1¼ cents.

Q. The price paid had nothing to do with the question of the allowance being necessary?—A. If the Union Pacific had no contract they would require an elevator.

Q. You mean your necessity for an elevator there was occasioned by the fact that other railroads had elevators at their terminals to the owners or proprietors of which these allowances were made?—A. Yes, sir.

Q. That was the condition that made it necessary for you to have one; is that what you mean?—A. I do not mean it was entirely for the sake of paying 1¼ cents. I mean to say we needed an elevator, the same as freight cars, to take care of that grain. That was the first thing.

When in need of elevator facilities at Kansas City, Rock Island negotiated with parties to build an elevator, but was unable to get this unless 1¼ cents was paid for elevation in order that they might compete with Peavey & Company.

The old elevator was sufficient for transfer purposes from car to car. This elevator could transfer from 25 to 40 cars a day. Rosenbaum built the elevator and was to be paid for it by the Rock Island by allowing them 15 per cent of the freight bills. If they did not ship over the Rock Island they would not get their money back.

E. J. McVann, Omaha, Nebr., secretary of the Omaha Grain Exchange:

749 Grain exchange organized on February 1, 1904, prior to which there was no grain market at Omaha. There are about 165 members of the exchange, of which 30 or 35 are actively engaged in the grain business on the floor. From September 1, 1905, to September 1, 1906, there was inspected by the Omaha exchange, in 23,111 cars, out 9,824, and weighed in 16,129 and weighed out 10,576. Price of grain in Omaha is based on the highest market to which grain is shipped. Has made up statement of the highest and lowest prices during months from January to August at Omaha. Has also secured from the Chicago Board of Trade the high and low prices for the same period on that exchange. The grain at Omaha is made up for different grades, while the grain at Chicago is "contract grade" only.

756 Trades on the exchange run up sometimes to two or three million bushels a day.

Because the Rock Island put in a rate to Memphis which was less than the proportional through Omaha from Kansas City and allowed an elevator allowance at Kansas City and not at Omaha, the exchange notified its members of the circumstances, but no obligation was placed on the members to boycott the Rock Island. Mr. Stream was not discriminated against because he shipped over the Rock Island and was not refused membership, as stated by him. His application is now before the exchange.

T. J. Brodnax, Kansas City, grain business, receiving and shipping grain, commission dealer, leases an elevator.

767 There are several elevators operated by elevator (railroad) companies that handle grain through the elevators free of charge, and these railroad companies do not allow, or will not allow, the private house the amount that it costs to operate these houses. In other words, we have property there and can not do business through our own elevators. When we do business over through roads we have to handle the grain through our elevators at a cost to ourselves and get nothing from the railroad companies to compensate us or offset the free handling it gets in going through their houses.

That is to say, that where grain is shipped through and is actually transferred from one car to another at Kansas City the railroads now perform that service themselves and charge nothing to the shipper if the transfer is made through their own elevators. If the transfer is made through an independent elevator, the railroad company will make no allowance for it. Besides transferring the grain, the railroad elevators also mix, clean, and clip grain, for which they make no charge. The elevator which cleans, clips, etc., its own grain pays

just as much when the grain is shipped out as if the grain was treated by the elevators of the railroad companies. Santa Fe Circular No. 2–A states that on grain shipped by the Atchison, Topeka & Santa Fe no charge will be made for cleaning, mixing, clipping, or rehandling. Has no objection to roads doing work free, but wishes compensation when he does it for them. Union Pacific provides for allowance to all elevators, but makes the stipulation that the cars shall be returned within forty-eight hours, which is practically impossible. Has no complaint against anyone; just wants parity.

Is president of the board of trade at Kansas City.

Q. You want to be in the position that if these elevators are rendering the service they separate it from their tariff, and if they allow the grain to go through your elevator, and an elevator other than the railroad's rendered that service, you want to be put in a position to be paid for it?—A. That is it. Total elevator capacity of Kansas City is nine or ten millions.

Q. Providing for the system of transferring and elevating at a terminal point like Kansas City, what additional help would be required for doing business other than that transfer and elevator business?—A. Very little. There is required ordinarily one or two men, and the additional help required to do this work would be a couple of men. In the Memphis elevator operated by Broadnax, with a storage capacity of 450,000 bushels, the average expense was in 1905 about eighty-two one-hundredths of a cent a bushel, and in 1904 ninety-four one-hundredths of a cent. The total amount of grain put through the elevator was 1,789,398 bushels in 1905, and the next year 2,300,000 bushels, and the cost was seventy-one one-hundredths of a cent.

789 This statement would not include anything for repairs, permanent improvement, or insurance on the plant. It does include rent. Thinks a small house could transfer grain at a cost of 1 cent a bushel, while a large house could transfer more grain and it would cost only a cent a hundred.

796 Elevator was built and equipped for a general commercial business. Would be willing to transfer grain for 1¼ cents. Atchison does the transfer for one-fourth of a cent a bushel, but gets a switching charge in addition. Witness does not believe that will pay the cost to them For the 1¼ cents witness would treat the grain and prepare it for market, transfer and consolidate it. Is engaged in handling grain for Peavey & Company store grain in a public warehouse, but dealers do not wish to put it through a public house when it can be put through the railroad house free. The house is used for public storage and a rate is charged. Also handles grain for himself; mixes it, etc. Also transfers grain for other people, for which he charges 1¼ cents a hundred, which is a small profit. Has done very little of that business in the last year.

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805 The 1¼ cents allowance for transfer would include storing, mixing, grading, and performing the various services which an elevator performs. Elevator statement shows that the cost would be a little more than that.

Q. Will you please tell the Commission why it is that with an expense of eighty-two one-hundredths of a cent per bushel and ninety-four one-hundredths of a cent per bushel for any year you rent an elevator for doing that grain business when you could have all of that service performed by the different railroads centering in and running out of Kansas City free of charge for every car of grain you might have to offer to them for shipment?—A. We do not wish to give up our lease and become tenants of someone else. We wish to be independent and operate our business ourselves.

Q. And it is because you can not do that at a profit without assistance you want the Commission, if they have the power, to compel the railroad companies to grant you that?—A. Yes, sir.

Statement showing grain elevators in Kansas City, storage capacity, together with elevators operated by railroad companies and private companies and milling companies.

	Operated by—	Storage capacity (bushels).
Elevators operated by railroad companies.		
"A"	Atchison, Topeka & Santa Fe	1,000,000
Kansas and Missouri	Missouri Pacific	1,000,000
Maple Leaf	Chicago & Great Western	500,000
Milwaukee	Chicago, Milwaukee & St. Paul	1,000,000
Total		3,500,000
"Q" elevator, in course of construction to be operated by the Burlington.		600,000
Private elevators.		
Acme	R. J. House Co	100,000
Empire	Ferd. Helm Brewing Co	350,000
Frisco	Jno. I. Glover (leased from Frisco)	600,000
Grand Avenue	Lanning & Harris	25,000
Gulf	Nash Ferguson Co	650,000
Kansas	Kansas Grain and Elevator Co	45,000
Memphis	Brodnax & McLiney (leased from Frisco)	450,000
Park elevator	C. A. Dayton Grain Co	100,000
Phoenix	Flanagan Grain and Elevator Co	125,000
Rock Island	Carrington Patton & Co	100,000
Rosedale	Fowler Commission Co	150,000
Russel	Russel Grain Co	50,000
A. T. elevator	Jno. I. Glover (leased from A. T. Ry.)	400,000
Southern	Amos Martin	40,000
Star	Geo. A. Adams Grain Co	60,000
Terminal	J. Rosenbaum Grain Co. (leased from Rock Island Ry.)	700,000
Union Pacific	Midland Elevator Co	1,000,000
Wabash	Missouri Grain Co	150,000
Kansas Grain & Seed Co		50,000
Globe Mill	Kimball & Fowler	50,000
Total capacity		5,195,000
Elevators in connection with mills.		
Atlas Oat Co		25,000
Bulte Milling Co		75,000
Crescent Cereal Co		50,000

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Statement showing grain elevators in Kansas City, storage capacity, together with elevators operated by railroad companies and private companies and milling companies—Con.

	Operated by—	Storage capacity (bushels).
Elevators in connection with mills—Continued.		
Interstate Mills		50,000
Ismert Hincke Mills		75,000
Kelley Milling Co		400,000
Kemper Mills		30,000
Minter Bros		25,000
Ransom Mill		50,000
Rex Mill		225,000
Southwestern Milling Co		250,000
Westons Warehouse Co		50,000
Zenith Mills		50,000
Total mills		1,355,000
Total elevator capacity		10,650,000

J. A. MUNROE, freight traffic manager, Union Pacific, Omaha.

811 There are 210 country elevators along the line of the Union Pacific in Nebraska, of which the Omaha Elevator Company have 74 and the Trans-Mississippi Company 24. Out of the total number the line houses represent 98, or 46.6 per cent of the facilities; the individual houses represent the remainder, 112 houses, or 53.4 per cent. The line houses in the year 1905, with 46.6 per cent of the facilities, did a total of 38.5 per cent of the business, measured by carloads. By line houses is meant the elevators belonging to the two companies, Omaha Elevator Company and Trans-Mississippi Company. For the year 1904 these elevators did 35.5 per cent of the business, and for the year 1903, 40.4 per cent. In the year 1905 at Cozad there were shipped 416 carloads of grain, of which the Omaha Elevator Company shipped 87, or 20 per cent, the Platt Grain Company 123 carloads, or 29 per cent. That is Mr. Leflang's company. The Cozad Grain Company shipped 78 carloads, or 19 per cent; T. L. Carrell, 96 carloads, or 23 per cent; and J. H. Darner 32 carloads, or 9 per cent. At Lexington there were 428 carloads shipped, of which the Lexington Mill & Elevator Company, Mr. Leflang's company, shipped 191 carloads, or 45 per cent. This probably includes flour. H. P. Nelson shipped 142 carloads, or 33 per cent, and A. T. Woodsum 95 carloads, or 22 per cent. The Omaha Elevator Company have no house at Lexington.

825 To-day, notwithstanding all the storage, cars are frequently scarce east of the Missouri River, and that, too, when the elevators having the contracts have all their bins full. While the transfer feature might properly be sufficient, the Union Pacific, convinced by its own experience that they were not sufficient, made a demand upon Peavey not only for the storage as it exists to-day,

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but also for providing additional storage as might be necessary in the future.

820 The object in consigning through to St. Louis is the reflection of an old custom, and in order to have entire possession of a document of the Union Pacific in the shape of the expense bill, which brings about east of Council Bluffs on the out shipment the protection of the proportional rate. All grain is billed to St. Louis, care of the Omaha Elevator Company, at Council Bluffs. The shipment is handled on the local rate of the Union Pacific from interior Nebraska point to Council Bluffs on what we term a local waybill. On arrival there delivery is made to the elevator company, the original bill of lading is retired, and expense bill covering the charges is given to the consignee and the transaction ends so far as the Union Pacific is concerned. All shipments are through shipments and go through the Peavey elevator. No allowance is paid on grain consumed locally.

822 The Union Pacific daily receives a large number of foreign cars loaded westbound to various points on its lines. No attention is paid to the initials and numbers of cars. When a car is unloaded on the line it is loaded home if possible; if not, it is loaded as far as possible. If a car has its destination in the grain belt, every care is exercised to load it homeward with grain, giving preference to through shipments routed east of Council Bluffs via the line owning the car, if the car is owned by a line west of Chicago and a direct connection of the Union Pacific. If not, but by a line east of Chicago, the car is not given to it; it is loaded as far as Council Bluffs or Chicago, regardless of the ownership east thereof. A great many foreign cars are loaded with grain of Peavey & Company, and when the cars are unloaded at Council Bluffs the obligation is with the Union Pacific to return them to the road from which it received them, but if it is a Chicago line sometimes the cars are sent back west. The storage capacity of the Omaha Elevator Company was made at the request of the Union Pacific in order that the busi-

825 ness might not be held up in times of rush. The transfer allowance of 1¼ cents was not a device or rebate in any manner, shape, or form. At the time the contract was made the allowance at Chicago was three-fourths of a cent a bushel, which on wheat is 1¼ cents per hundred. This made the allowance on corn only 7 mills, and 4 mills on oats. This contract was based on Chicago,

530 and was worth more than it cost to the Union Pacific in the opinion of the witness. At the time of the negotiations of the Peavey contract the Union Pacific had an elevator of its own at Omaha, or one in which it owned 50 per cent of the stock, and this elevator was leased to Mr. Peavey and operated by him. It has

now been dismantled and the ground is now used by the Union Station and approaches.

There are certain transfer allowances here (at Chicago) at a quarter of a cent a bushel, but the three-quarters of a cent a bushel is obtainable through the public houses. The situation at Minneapolis is different from that at Omaha, because at Minneapolis there is a market, and at the time of the making of the contract there was no market at Omaha. The fact that there is a market at Minneapolis makes no difference in the service performed in transferring grain from car to car. Market conditions do not affect the standpoint of railroad operation. The service and the revenue are the same when grain is consigned through to St. Louis and when billed locally to Council Bluffs. There is no other shipper for whom the Union Pacific issues the through bill but Peavey & Company and the Trans-Mississippi Company.

850 On cross-examination witness stated that at the time negotiations were begun with Peavey & Company they had no interest on the Union Pacific. At the time of the making of the contract Peavey & Company were established on the line of the
849 Union Pacific and had 70 or 80 elevators and two terminals at Council Bluffs and Omaha with a capacity of something between one and two million bushels. Peavey & Company have conducted a general business in the elevator all the time.

In the calendar year 1905 the total movement of grain on the Union Pacific to Omaha and Council Bluffs was 19,852. The allowance for transfer was extended to all elevators at Kansas City, Council Bluffs, and Omaha because there being a large number of new houses it might be contended that the contract would be discriminatory. The Union Pacific did not consider it as discriminatory. There is a terminal elevator on the Union Pacific at Denver, of about 500,000 bushels capacity. Union Pacific delivers carloads
869 of grain into that elevator destined to points beyond and pays no allowance.

At the time Mr. Munroe entered the service of the Union Pacific, in 1882, there was an old elevator at the terminal that was operated by Merriam & Himebaugh, with a capacity of about a million bushels, constructed partly by the Union Pacific and some local capital, which was leased to the above firm shortly after its erection. The Union elevator was constructed in Council Bluffs about 1883 by six railroad companies and was leased to the Council Bluffs Elevator Company. Mr. Peavey in 1890 leased these elevators and acquired a line of houses on the Union Pacific.

875 Since 1882 these elevators had arrangements with the Union Pacific and were paid allowances sometimes larger than 1¼ cents. Prior to 1887 it was due to a struggle for the business

entirely. From 1887 to 1899 competitive conditions sometimes were responsible for the rebates and sometimes it was payment for services.

888 After the old Union elevator was burned and the new Trans-Mississippi elevator was built there was a contract similar to that of Peavey & Company entered into. This was in the two years previous to the hearing.

891 There was formerly a contract between the Midland elevator and the Union Pacific Railway, but the receivers refused to recognize the contract and no new contract was ever entered into.

No allowance has been paid in the last sixteen years to any elevator outside of Kansas City, Omaha, and Council Bluffs. Conditions at Denver are considered dissimilar, although grain leaves the lines of the Union Pacific and goes on lines to the West and South.

896 There is another class of business on which railroad companies pay allowances for unloading, which is live stock at Missouri River. The companies place the cars at the chute and the animals walk out, unloading themselves. The charge is allowed by all the railroads and is 50 cents a car at Kansas City, and the allowance is made to the stock yards at South Omaha.

902 This allowance is paid to the stock yards company and not to the owner of the stock.

Does not consider that a consignee who has no elevator who releases the cars of the Union Pacific is entitled to the allowance just the same as the elevator. Does not think it is any discrimination because one party has provided facilities and has entered into a contract. The general custom the country over is for the consignor to load and for the consignee to unload carload freight. Tariffs provide rates on carloads of grain from points of origin in Nebraska to Omaha and Council Bluffs, and, independent of this contract, the consignee would be required to unload that carload of grain. Would not only be required to unload, but presumably would be required to provide the place where the shipment could be put. Rules of the western classification expressly provide that the consignor or consignee shall unload carload freight.

The Peavey elevators in the country are of modern construction and of larger capacity than those of the independent elevators, and therefore the estimate of the percentage of the business that Peavey & Company do would show that Peavey & Company were doing a smaller proportion than the above house-to-house statements show. This statement does not include grain that is sold by farmers and independent elevators to Peavey & Company. Practically 30 per cent of the grain received at Omaha and Council Bluffs over the Union Pacific is sent through the elevator of Peavey & Company. Less than 50 per cent of all the grain shipped into Council Bluffs and

Omaha from all over the Union Pacific during 1905 received the allowance.

917 Motive in executing the Peavey contract was to keep the cars at home and because grain business represents a large movement which moved hurriedly in comparatively short periods.

929 Although the conditions at Kansas City may be similar to those at Minneapolis and the transfer charge at Minneapolis has been reduced, the Union Pacific has not seen fit to reduce the transfer charge at Kansas City, because they have considered Council Bluffs and Kansas City together and did not wish to reduce the charge at one place without reducing it at the other.

Putting up of elevators and extension of tracks for the handling of business at Omaha made a change in conditions, so the tariff

932 of June 27, 1906, giving the allowance to all elevators was put in.

We treat the Peavey shipment as a local shipment, so far as local waybill is concerned—that is to say, we use the same form there, the same kind of bill, made out with the same pen and ink, no doubt, and handle it on a local waybill, when, as a matter of fact, the Peavey business is through business.

So far as the release of equipment is concerned, so far as the service which is performed by both is concerned, it is identical, whether the business goes through or whether it stops at Omaha, Council Bluffs, or Kansas City. Although grain brought into Kansas City, ground into flour, and shipped out is treated by the railroads as a grain shipment from the point of origin to the point of destination, the flour taking the balance of the through rate at exactly the rate paid on grain, the allowance is not made to millers, although the millers release the equipment.

935 Does not believe the elevation allowance is reflected back into the country or to the points of destination.

Thinks the payment of the allowance under the tariff of June 27, 1906, should be confined to the elevators who actually do the transferring, just as named in the circular. In case a grain dealer has grain transferred through a railroad elevator for which he is charged nothing should not be paid.

Q. Have you arrived at sufficient conclusion as traffic manager and in your own mind whether to allow the Chicago & Great Western, that performed this service and released the equipment, 1¼ cents a hundred under this circular?—A. Yes.

Q. So that any claims presented of the character of the Great Western where they or other railroads release the equipment through their elevators under the forty-eight-hour limit, under that provision of this circular, will be paid?—A. That is my understanding.

957 The difference of situation at Denver and Kansas City is in volume of business and in interchange with connecting lines. It is not a terminal point to all the business of the Union Pacific, but is a terminal point for the small amount of grain that goes over the Denver & Rio Grande and the Colorado & Southern. The service of releasing equipment is practically the same in both cases, but the necessities for the return of the empties are very much less at Denver than at the Missouri. The actual service is identical. A
965 technicality which has delayed the payment of claims of elevators is the consideration of whether or not the allowance should be paid for the release of, for instance, a Chicago & Alton car at an elevator situated on the Chicago & Alton tracks when the car is not actually returned to the Union Pacific. There have been constructed on the lines of all the railroads in Kansas and Nebraska associations known as Farmers' Elevator Company Associations, formed by a number of farmers associating themselves and building elevators and trackage facilities.

974 Since the previous hearing the rate has been changed so that the combination of the locals from the point of origin to destination is just the same as the through rates.

The CHAIRMAN. Upon what theory, Mr. Munroe, do you claim that that is a through shipment? Of course you know in a commercial sense that that grain is bound to go, sometime, beyond the Missouri River, because you know that there is no consuming market there adequate to take care of all that great production; but upon what transportation theory or how, in a transportation sense, can you regard such a movement as a through movement, where there is in no instance a carload billed to the point to which it is expected that that car will go; where, as you have already stated, the operations of your company, the rates of your company, everything in which your company is interested, are precisely the same as though the shipment was to be consumed at Omaha, and where in addition the through rate to any given destination is exactly the sum of the locals? Now, in what transportation sense can you regard that as a through shipment?

Mr. MUNROE. Why, I think the presence of the elevator at Council Bluffs, put up there under this contract, in accordance with plans insisted on by the Union Pacific, does not in itself change the character of the business. Furthermore, I believe that if Peavey & Company did not have that house there that that company would not operate to change their conditions in the interior, but, on the contrary, they would operate their interior houses just as now, and we would be called on then to furnish either cars to go through to destination in the East without transfer, or to funnel it through other houses at our terminal points, and therefore, as I can see, and I have tried to see it fairly, it is purely through business, and it is stored

there as a commercial necessity for the Union Pacific, because it has not enough equipment and can not afford to always have plenty of cars to go through from origin to destination without transfer on every shipment. I say can not afford to, because a portion of the year we would have so many idle cars that the burden of providing them would be quite material. That fact, and also the well-known one that there is practically none of the grain consumed in Omaha or Council Bluffs which they handle, makes me feel that it is nothing but through business. It is through business perverted, if you want to use that term, by our necessities. The same condition regarding through shipments exists at Chicago.

979 On pages 979 to 986 the question of whether or not the shipment of grain from a point of origin in Nebraska to Omaha, thence after several months storage shipment east, constitutes through transportation was taken up.

The discontinuance of the allowance by the Union Pacific would give an advantage to other carriers who have lines east of the Missouri River whose interest is to haul the grain through to the eastern terminals of their railroads and to keep it out of Omaha. If it breaks bulk at Omaha, they lose a certain part of their hold on the business.

990 Does not know of any place where the conditions are similar to those at Council Bluffs and Kansas City. The Peavey elevator at Council Bluffs is a private elevator, as the term is used in Chicago.

1003 Mr. H. GOWER (recalled):

The cost of the elevator at Kansas City was $257,252.49, which included the $5,000 paid to Mr. Rosenbaum. The $5,000 was to cover the interest on the investment of Mr. Rosenbaum, or the money advanced by Mr. Rosenbaum in the building of the elevator. The figures made up by Mr. Rosenbaum of the exact interest that accrued was $4,935.75. The amount of bills rendered to Rosenbaum Grain Company up to the time of suspension of payment of 1¼ cents was $13,224.43, of which they paid $3,577.42. At that time a dispute arose and the matter was delayed in adjustment.

The suspension of the 1¼-cent allowance was in consideration of the waiving of rental charge during the same time. The back rent was to be collected.

Would consider that if allowances were made at Kansas City or any other point, it would cause allowances to be made at every other grain center under similar conditions. Considers the granting of allowances as practically reducing the rate.

1012 There is no difference in principle and effect, except possibly, in degree, measured in dollars and cents, between the giving of elevator allowance or between furnishing a big plant free.

There is no difference in principle in paying somebody else for doing the service or putting the railroad company's money into an elevator of its own, providing a service, and doing the work itself free of charge.

1012 Thinks elevator facilities are absolutely necessary to the Rock Island at Kansas City. Rock Island could not get an elevator constructed unless they allowed the 1¼ cents allowance. The necessity of the Rock Island for the elevator was independent of the Peavey contract, but it was found that during the existence of the Peavey contract an elevator could not be obtained without duplicating the Peavey contract. To compete with the Union Pacific under the Peavey contract other roads put in an elevator allowance and sometimes the allowance was paid where the actual elevation was not performed. This allowance caused more instability in grain rates than any other thing.

1018 The proportional rate west of the river is fixed regardless of where the grain originates and is applied on any grain that anybody can present an expense bill to cover west of the Missouri River.

Q. That means, if I understand you correctly, that in the case of the Midland Elevator Company or Peavey & Company, say at Omaha, if they brought in grain to Omaha and got an expense bill from the Union Pacific Railroad Company, they could traffic in that expense bill and anybody else could use it outside of Peavey & Company for getting the balance of the proportional rate on an outgoing shipment?—A. I think there is no doubt about that. I have never heard it denied. Thinks this has been done. Does not know of any instances where this has been done with knowledge of the facts by the railroad officials.

1021 Thinks the 2,000,000 bushels of Iowa grain shipped into Omaha which went east on a proportional rate and the lines that took it knew that it was Iowa grain, was shipped on a regular published tariff, maximum rate would be the Iowa distance tariff to Council Bluffs plus the rate out. (This grain was mentioned in previous hearing in the testimony in this record.)

1035 JAMES PETTIT, president and manager of the Peavey Grain Company of Chicago, which owns two elevators in South Chicago, one of capacity of 750,000 bushels and the other 1,600,000 bushels. One of the directors of the Chicago Board of Trade and on the Transportation Committee.

In Chicago there is an elevator capacity of 24,000,000 public and 43,000,000 private. A public warehouse or regular warehouse is one chartered under the laws of the State of Illinois to act as custodian for grain belonging to the public. A private warehouse is engaged in the transaction of private business. There are six or

seven so-called railroad elevators in Chicago with an aggregate capacity of not in excess of a quarter of a million bushels.

1038 The charge at public elevators provided by law is three-fourths of a cent per bushel inclusive of ten days' storage. This includes putting in and taking out. For every day over ten days one-fortieth of a cent per bushel is charged. This charge is for grain in good condition. A higher charge is made for grain in poor condition.

Has made transfer through his private elevators for as low as one-half cent a bushel. Cases are very rare. One of the Peavey elevators is a public house and the other a private house.

Understands that transfer is made for railroad companies for one-fourth of a cent a bushel, but has never heard of it being done

1042 for anyone else, except as testified to by Mr. Stream.

The three-fourths of a cent provided by law is a maximum charge allowed. Understands that at Minneapolis grain is put in, stored, and loaded out for one-half a cent a bushel, storage for ten days. The customary charge for simply transferring grain for the railroad companies from car to car through an elevator is one-fourth of a cent per bushel. A majority of the grain that comes into Chicago is handled by private concerns for the profit on the grain.

Mr. N. MERRIAM, Omaha, Nebr.; elevator business, having

1086 two elevators, located on the belt line owned by the Missouri Pacific about a mile apart, with a capacity of six hundred and a hundred and twenty thousand, strictly private terminal elevators. One has been built about eighteen years and the other about nine months:

Has no country elevators, but buys grain from independent dealers and line houses wherever possible. Buys some on the exchange. The principal source of trade is giving shippers the benefits of a terminal elevator. Handled about 6,000,000 bushels of grain during the previous year; half corn and balance oats and wheat. Receives grain on consignment and sells as a commission house. Stores, transfers, or manipulates grain for other persons, but this is a rare thing. Usually arrange to purchase the grain. Has never done any transferring for less than 1¼ cents per hundred pounds, which includes ten days' storage if necessary. The identity of grain transferred is preserved.

It is an injustice to independent shippers to have

1092 railroads doing a transfer business and manipulating the grain in any way free of cost to anybody. "It competes with the elevators and gives the benefit of the investment in an elevator, say, as ours is, of $150,000 and the cost of managing that elevator,

free to a party with an office, you might say, in his hat, without any capital, to take the business right out of our hands, with the
1093 assistance of the railroad giving him all these benefits that cost us hundreds of thousands of dollars."

If a railroad undertakes to carry a car of grain through from point of origin to some eastern destination and for their own convenience prefer to transfer the grain to other cars at Omaha, they would have a perfect right to do that.

Where railroads offer opportunity of free transfer anybody can bid the whole western country for grain on that basis and come in competition with men with hundreds of thousands of dollars invested and who are using hundreds of thousands of dollars capital besides, and can ruin their business with the assistance of the railroads.

Is situated on the Belt Line. Buys on the line of the Union Pacific and gets along very well. Ships over the Union Pacific and gets allowance for releasing their equipment. Thinks the sales on the Omaha Grain Exchange do not exceed from 6 to 10 cars a day. Omaha has been discriminated against by the railroads in the matter of rates. To a large extent on all roads except the Union Pacific the through rates are less than the combination of locals. I might say that in the large part of Nebraska the rates are fixed up, lined up, for Chicago, Kansas City, and St. Louis, and Omaha is cut out. That refers to a large part of southern Nebraska. In northern Nebraska they have been lined up from Minneapolis and Chicago, and Omaha was cut out. This does not apply to the Union Pacific. The North Western discriminates by making its through rate from 1 to 3 cents lower than the sum of the two locals via Omaha.
1104 The through rate is less than the local to Omaha and the proportional out. Thinks the railroads should be prohibited from giving free transfer.

Q. The existence of large elevators and large elevator capacity is necessary to a thrifty and healthy grain market?—A. There is no question about that.

Allowance that he received from the Union Pacific was five-sixths of a cent per hundred. Received it until 1905. Since then claims have not been paid. Has never objected to payment by Union Pacific to Peavey & Company. Thinks all elevators should receive the allowance. More has been paid on the Union Pacific when the
1114 allowance was being paid than on the other lines for grain.

Mr. HEFFELFINGER (recalled):

1053 The estate of F. H. Peavey is a partner in the grain business and owns about 3,000 shares of B preferred stock of the Chicago Great Western. There are in Kansas about 1,279 country elevators, of which 956 are independent and 323 line. The line elevators are

operated by companies who have several elevators; on the Union Pacific there are 71 line elevators and 147 independent; of the 71, Midland Elevator Company owns 40, Hoffman Elevator Company 21, and Morrison Grain Company 10.

Elevators in Kansas.

Railroad.	Line elevators.	Independent.	Total.
Atchison, Topeka & Santa Fe	83	309	392
Missouri Pacific	90	216	306
Chicago, Rock Island & Pacific	50	103	153
Union Pacific	71	147	218
Leavenworth, Kansas & Western	12	6	18
Frisco		70	70
Chicago, Burlington & Quincy	17	23	40
Missouri, Kansas & Texas		26	26
Grand Island		34	34
North Western		22	22
	323	956	1,279

1056 There are in Nebraska about 1,285, of which 756 are independent elevators and 529 are line elevators. On the Union Pacific there are 121 line elevators and 114 independent. Peavey & Company operate approximately 70. Midland Elevator Company purchased during the time, from July 1, 1905, to October 1, 1906, 341 cars out of the total receipts from various railroads on the exchange at Kansas City, shown by the records of the board of trade as 8,621 cars, or less than one-half of 1 per cent of the stuff that came

1057 to Kansas City that went on the board of trade. Purchased by the line houses of the Midland Elevator Company, 2,464 cars, of which 578 cars were shipped west, 341 cars were sold to millers, 114 cars shipped to Kansas City and sold on the exchange and did not go through the elevator. Besides the 40 elevators on the Union Pacific, Peavey & Company have 10 elevators on the Leavenworth, Kansas & Western. About one-half of the grain purchased by the country elevators of Peavey & Company never went through the elevator and never received the allowance. Thus, of the grain that came into Kansas City, Peavey & Company owned about 1,400 cars, and others 7,200 cars, and of those 7,200 Peavey & Company purchased about 182 cars of independent dealers and 341 on the board of trade.

1059 Of the number of foreign cars in the statement made up by Mr. Chase which were received at the Peavey elevator many were received with grain which came from Iowa. There were 1,700 cars received with the Iowa grain and of this number a very small percentage were Union Pacific cars.

1062 In Santa Fe Elevator Company Circular No. 2 provision is made whereby cleaning, mixing, clipping, or rehandling will be done and a charge made unless the traffic moves out via the

Santa Fe. They are thus furnishing facilities for other merchants with whom all must compete and charging nothing for the service provided it goes out over the Santa Fe.

1068 "In interpreting Chicago Great Western G. F. D. No. 13059, it would lead me to believe that it is possible, not the intention possibly, for anybody with any amount of storage to have it handled in the Great Western Elevator for any length of time by simply saying they (the railway company) could not furnish cars."

1070 Conditions at Minneapolis are not similar to those at Kansas City and Omaha. At Minneapolis there is a large consuming market. Elevators have opportunity of buying, selling, and storing grain as well as mixing and getting profits.

If it were not for those advantages and the fact that the Union Pacific by their allowance practically pays the expense to us of running the elevator, we could not afford to run it. Could better by far go back in the country and build storage there at probably half the cost of what it would be in Omaha and have every advantage of through shipment. Have elevators at Chicago, Minneapolis, and Duluth and could arrange to clean grain in them for nominal amount.

1076 There is no advantage in billing grain through to St. Louis, and Peavey & Company would bill it locally if requested to. Interprets the tariff providing for the proportional rate from Omaha to the East as applying on grain from Iowa.

1116 Tariff of Chicago, Milwaukee & St. Paul provides for no charges for transfer including elevation and reloading when the shipments are forwarded via the Chicago, Milwaukee & St. Paul.

1121 All cars go into the elevator, whether they are Union Pacific or foreign cars, and are unloaded and then switched back to the tracks of the Union Pacific the same day and are without the jurisdiction of the elevator company, and if they are sent to the elevator, it is because of orders placed with the railroad companies.

Actual cost of operating the plant is more than the allowance. Even if the actual cost of transferring grain for others were less than 1¼ cents per hundred, it would not act as a rebate, because they have a right to obtain whatever they can for the elevator service and they would not transfer a man's grain if there was no profit. Since the last hearing the actual cost of operating the elevator has increased.

For a strictly car-to-car transfer only a skeleton of a house is needed with a leg, facilities for weighing—that is not necessary unless the weights should be obtained, but usually would be customary—

and sufficient bin capacity to take care of the few cars of grain. The time storage capacity is needed in the market is in the rush of business, when more is coming from the country than can be taken care of and can be stored. At that time a car-to-car transfer would be inadequate or absurd, because if the car is there to go out, a simple exchange of cars could be made by the railroads.

Grain which goes into the elevators at Chicago is considered as having stopped there, and any transportation afterwards is another matter. If this was done at Omaha the business would be unprofitable and ruin the Missouri River markets. The elevators at Chicago and St. Louis would have the entire amount of grain to compete for, coming from all the fields. Would sooner have his cleaning, etc., done in the country than run the elevator if there was no allowance. The elevator is profitable to us only so long as we can continue the contract. A business man would not locate a jobbing house out in Nebraska as quickly as he would in Chicago. He would not locate an elevator at a point where he had only the grain tributary west, as in Nebraska. The quantity is cut off to just that amount of grain which they can raise around there and he must depend upon that. I would not locate an elevator at Omaha as an elevator proposition, nor Mr. Peavey never would have done so, because he has elevators at Minneapolis and at Chicago—we could have put a house at St. Louis and could have had the work done there a good deal cheaper. I would much rather have the capacity in the country, where the insurance is cheaper and where I had the same facilities for through billing at the time I was to ship out. Other men have built elevators at Omaha because they understood that the allowance would be paid.

Mr. RANKIN, representing the Rock Island Railroad Company:

Contracts of the Rock Island with Rosenbaum & Company
1125 were introduced by Mr. Baldwin, and Mr. Rankin wished to explain why the rental of these elevators was only nominal, $1 a year. These elevators are about the oldest elevators in Chicago. After contracts with Counselman Company were ended the elevators remained empty for a considerable length of time and no tenants could be found who would pay any consideration as rent, as the rate of insurance of the contents was doubled by the insurance companies. These elevators were leased to Rosenbaum for the nominal rent, because through having these elevators occupied the Rock Island received some $15,000 a year in switching charges to the elevators.

D. O. IVES, general traffic manager of the Wabash System, St. Louis, Mo., for fourteen months. Previously general freight agent of the Burlington, west of the Missouri River, at Omaha. Prior to that

general freight agent of the Missouri line of the Burlington at St. Louis. At Omaha three years and at St. Louis thirteen years:

Wabash runs from Council Bluffs to Omaha and Kansas City on the west, to Buffalo on the east, with a line running to Chicago and through St. Louis. Is familiar with the movement of grain and ... vator facilities at Buffalo. Trunk lines pay one-half cent per bus... on the grain transferred from the elevators on the water, on the la... side, into their cars. Some of the receiving lines pay a quarter o... cent a bushel on grain received by all-rail lines. This one-half of... cent is paid to elevator companies, part of which are railroad co... panies' and part private. This is paid out of the rate.

Wabash have trackage rights over the Grand Trunk and the use of their facilities, which are very insufficient; 50 cars were shipped 1157 from our line and it congested them for a week or two. The one-half cent allowance is confined to ex-lake grain. There is an allowance for transferring grain at Buffalo, where the grain comes in by rail, of one-fourth of a cent a bushel, paid out of the rate. The Wabash gets no grain to pay the allowance on—that is, when the Wabash takes grain to Buffalo they make an allowance of one-fourth of a cent to the connecting line for transfer. From experience and knowledge of witness it is his positive view that it is entirely necessary for railroad companies to have elevators at their termini for the expeditious handling and transfer of grain. It is more practicable for the railroad to hire the service of transferring grain performed by an elevator company and pay an allowance for doing this than it would be for the railroad to perform the service itself.

I think that if proper elevator facilities are furnished at nearby termini—as, for example, Omaha for Nebraska and Kansas City for Kansas—the effect is beneficial to the community, to the farming and grain-growing community, and to the railroads, because it enables the cars to do their maximum work. They can be handled promptly to the nearby termini, unloaded there, and then run back to the grain field. That is not the case where the grain goes to distant terminals, because on account of the congestion and disagreements between the originating railroad and the other railroads oftentimes cars are hung up at terminals on junction points, because there is a controversy between the roads as to cars; also because of congestion at distant points. The farmer gets the benefit of it because he gets a ready market and prompt payment for his grain. It is necessary for the preservation of markets to have ample storage, and if the payment of an elevator allowance is necessary in order to encourage the building of elevators, it is a good thing, provided the allowance is paid indiscriminately to all parties owning elevators, for prompt release of equipment.

Through carriers naturally wish to secure the longest haul for the largest share of the grain possible and endeavor to force the grain through to their long haul, but the fact that the through lines are building elevators would indicate that they think there is a necessity for furnishing elevator facilities.

Wabash pays allowance at Toledo for unloading cars. The elevators at Buffalo are operated to facilitate and complete through carriage just as they are in Omaha. Grain is held in
1165 the elevator as a depot. The elevator is not a railroad necessity as a mere matter of transfer or through shipment of grain. Allowances help to build up the communities and markets and are to some extent caused by competition of railroad-owned elevators. "Referring to the operation of the road, simply carrying the business without reference to the securing of the traffic, without being a transportation man, I can not see how it (allowance) has any effect or bearing on the transportation question."

Does not think that the payment of allowances is equivalent to a reduction in the rates. "It seems to me it is a distinction without a difference." The real service paid for is for the holding of the grain in the elevators until the cars can be furnished to go out—that is, releasing of cars or holding of the grain until the other cars can be furnished.

An allowance for loading out or receiving grain in an elevator would have a corresponding effect upon the other roads as reduction in the rate, if the question is simply answered yes or no.

An elevation allowance of one-fourth of a cent a bushel is paid to all elevators at Toledo, Ohio, by the Wabash. The owner of the grain runs the elevator. It is not paid to millers. The grain man does not perform any different service in releasing the equipment than the miller does. The reason for the difference in the treatment accorded to the miller is that it has been generally conceded that the manufactured product is entitled to a higher rate.

1174 Q. Well, was it an endeavor to even up a traffic proposition or commercial condition that you are trying to fix up or to balance off this advantage you give the miller—some kind of an advantage to the elevator man so as to let him operate and send the grain on farther?—A. It relieves any possibility of discrimination, I think. I meant to say that the fact that the miller gets the milling-in-transit privileges when it has been generally conceded that from 1½ to 2 cents more might be reasonably charged, relieves the railroad from any charge of discrimination if they do not make an elevator charge to him, even though they make it to an elevator in the grain business only. Cars are not unloaded as promptly at elevators of millers.

An elevator allowance is paid also at East St. Louis, Nashville, Louisville, Evansville, Cairo, Buffalo, Detroit, Chicago, Toledo, etc. At Toledo the allowance is one-fourth of a cent a bushel.

Parties at Toledo would unload their grain from the car to their own elevator just the same if the allowance was not made.

1184 It would be advantageous for a line having lines only east of the river to have the allowance made at Omaha or Kansas City, so that the grain would be stopped and stored, and thus it would get a share of it over its road on its journey east. When witness was with the Burlington, was very anxious to have them build elevators at Omaha to compete with the Union Pacific in the question of prompt return of cars, because they always had a better supply of cars in the country than the Burlington.

1189 For a purely transfer proposition an elevator could be erected at a comparatively small expense. It would not be necessary in that regard to have any storage capacity to hold the grain for greater or less amount of time awaiting the competition of eastern roads to take it out, but it could not accomplish the object at all.

No allowance is made for unloading grain at St. Louis. The matter of paying the allowance at St. Louis is under consideration. Cars are not unloaded as promptly at St. Louis, because the facilities are not as good. The greater part of the grain that goes to St. Louis goes south and the southern roads pay three-fourths of a cent allowance.

The allowance is paid at Toledo on grain going out of the Peavey elevator at Council Bluffs.

1199 The Wabash pays at the Missouri River one-half cent a hundred, but this is not paid on grain that comes from the Union Pacific which has already received the allowance.

Q. You don't understand my question. At Toledo you pay, don't you, on grain that comes out of the Peavey house?—A. On grain that comes out of the Peavey house. Yes, sir; but it equalizes itself with the half cent paid.

1187 Real object of the outgoing line in paying allowance is for holding of grain in the elevator awaiting outgoing cars. I claim that this is a service that is equally important to the in and the out line to compete with a through line.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

EXHIBIT I, PART 2

ABSTRACT OF TESTIMONY

BEFORE THE

INTERSTATE COMMERCE COMMISSION

IN THE CASE OF

TRAFFIC BUREAU, MERCHANTS EXCHANGE OF ST. LOUIS

v.

CHICAGO, BURLINGTON & QUINCY R. R. CO. ET AL.

Hearing at St. Louis, Mo., October 23, 1907

85568—09——12

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HEARING AT ST. LOUIS, MO., OCTOBER 23, 1907.

GEORGE H. CROSBY, freight traffic manager of the Chicago, Burlington & Quincy Railroad Company:

Rate of the Burlington, as shown in tariff I. C. C. 8488, from Friend, Nebr., to Omaha is 10.2 cents per 100 pounds on wheat and 8.5 on corn. Rate as shown in tariff I. C. C. 8523, from Friend, Nebr., to St. Louis is 19.2 on wheat and 16½ on coarse grain. Rate from Omaha to St. Louis is 9 cents on wheat and 8 cents on other grains. Through rate is equal to local plus the proportional. Tariff C. B. & Q. 1999–C, I. C. C. 8626, provides for an allowance for the transfer of grain at the Missouri River of cost, not to exceed three-fourths of a cent per 100 pounds—that is, at Council Bluffs, Omaha, South Omaha, Kansas City, St. Joseph, Atchison, Leavenworth, Elwood, Nebraska City, Rulo, and Lincoln. The adjustment suggested is fairly representative of the stations on the Burlington. It is not made the same through all Missouri River gateways. In some instances it is made by Omaha and in others by other Missouri River points. In order to determine the rate from a Kansas or Nebraska point, the rate from the river is added to the local up to the river.

"The rate to Kansas City we have established added to the rate from Kansas City might make the through rate, but we would not, in our method of handling the business, take the business that way, if it was consigned to Chicago or St. Louis." While the combination would determine the rate, it would not necessarily determine the route.

Rate from Friend to Kansas City is higher than to Omaha, "so the combination in that instance would not make through Kansas City." The rates from Omaha to St. Louis would apply on any business forwarded from Omaha originating beyond the Missouri River, regardless of whether there was a joint through tariff or not.

15 On grain received from an elevator at Omaha the charge for transportation to St. Louis would be 8 cents on corn, and the Burlington would pay to any elevator except those receiving over the Union Pacific three-fourths of a cent per 100, which is practically a loading-out charge. The three-fourths of a cent is paid for transfer. It is a matter of indifference to our road what else is done provided the road gets its service. The allowance is paid for a service at Omaha, and 8 cents is for hauling the grain to St. Louis. Grain might come into Omaha in a foreign car, which under present conditions would cost 50 cents per day. It might be cheaper to pay for

the transfer than to pay that rental. Then there is the possibility of having cars loaded to the full capacity. Can not always load cars to their full capacity at country elevators. The allowance would be made if the grain came to Omaha in Burlington equipment and went to St. Louis in Burlington equipment, if it is transferred through the elevator. This practice is forced by competition, because another line would pay for the transfer if the Burlington did not, and get the haul to St. Louis. Grain shipped from Friend, Nebr., through to St. Louis would probably not go through Omaha, because Omaha is a little off the direct line. There is some additional expense in hauling grain into Omaha and then reshipping to St. Louis, but the rate to St. Louis from Friend is made on competition over which road has no control.

24 The transfer allowance has no connection with the tariff rate; it is a separate charge. It has nothing to do with the price of grain at Friend, Nebr., unless the man who transfers the grain is in the grain business. A great deal of the transferring is done by parties not in grain business. The grain dealer would not get any advantage unless it cost him less than three-fourths of a cent to transfer the grain.

25 "A good deal of this transfer work is done by parties who own a line of country elevators. Say a grain firm owns 50 or 100 elevators in the country. They have that many agents buying grain. Of course they are buying the grain under general directions from headquarters. For example, they may tell the country dealer to pay a certain price for No. 3 wheat, and he pays that price for what in his judgment is No. 3 wheat. When he gets a carload, suppose he advises the owner at headquarters that he has a carload of No. 3 wheat, and he gets instructions to ship it direct to St. Louis, for example. It lands in St. Louis and the inspector here says it is No. 4 wheat. The St. Louis man has the settlement of the matter practically and entirely in his own hands. So the owner of this line of elevators says, 'I can not do business that way; I am entirely at the mercy of my people at the east end,' and he wants for his own purposes a central point where he can examine this grain before it is disposed of in the markets and manipulated. In other words, I think that these elevators at terminal points, at these important points on the Missouri River, are essential to the business of the parties that operate them—more for that purpose than for any transfer purpose."

27 Since the Burlington has been paying the transfer allowance at the river, the movement from the territory west of the river to St. Louis has increased over 5 per cent, comparing the period from July 1 to September 15, 1906 and 1907. The Great Western owns and operates an elevator on the Missouri River through which grain

is transferred free of charge. Does not know of any private individuals on the Missouri River who operate an elevator who are not either grain buyers, sellers, or have a line of elevators in connection with the terminal elevator. The Updyke Grain Company
31 owns an elevator at Omaha to which some of their grain is shipped, and they also lease a portion of the storage of the Chicago Great Western elevator.

But for the competition of the Burlington with other carriers it would not be necessary for them to make this transfer allowance. The Burlington has stood ready to make the transfer of the Union Pacific grain without expense to them. It is a more paying proposition for the Burlington to have grain shipped through from point of origin to St. Louis instead of transferring at Omaha. If the Burlington should reduce the rate through three-fourths of a cent to equalize the rate to St. Louis, the Great Western, for example, would also reduce their rate—that is, they would insist that the freight rate from the point in Nebraska should be the same as the local combination on the Missouri River. Is forced to pay the allowance. Would not pay it for a second if could get out of it. Theoretically the grain dealer who buys grain in Nebraska and reaches the same market that the grain dealer in St. Louis reaches would be able to place his grain at the destination three-fourths of a cent cheaper provided there was no expense of putting the grain through the elevator, but it might cost that to put it through the elevator.

34 In St. Louis the elevators are not owned by the grain men and the grain men pay the elevators for handling grain. Understands that the St. Louis grain dealers are receiving three-fourths of a cent on business going east and southeast. As far as the Burlington is concerned in the paying of transfer charges, St. Louis is entirely different from points on the Missouri River because the Burlington has nothing further to do with the grain after it reaches St. Louis. Finds no competition at St. Louis that compels it to pay transfer.

39 Elevator charge is paid whether it is through a public or private elevator; is paid to anybody who performs the service. There has been some increase in the business from Nebraska points to Omaha on the Burlington.

C. C. P. Rausch, assistant general freight agent, Missouri
46 Pacific. Has been in the service of the railroad eighteen years. Has charge of the publication of tariffs. The situation of the Missouri Pacific is pretty much the same as that of the Burlington. Generally the rates of the Missouri Pacific are made up on the same basis as those of the Burlington. But in the central and southern portions of Kansas they are not always the full combination.

Missouri Pacific brings some grain into St. Louis and carries it out for some southern destinations. On grain destined to Texas they pay three-fourths of a cent elevation charge, because it comes in competition with the Missouri, Kansas & Texas Railroad. No allowance is paid when destined to the southeast, as Missouri Pacific does not reach the so-called southeastern markets. Missouri Pacific does ship considerable grain from Kansas and Nebraska to Texas on which allowance is paid to St. Louis elevators as well as to the others. This allowance was made to meet competition of Missouri, Kansas & Texas. Grain which goes to Texas from St. Louis originates
51 in Kansas and Nebraska. The rates are higher by way of St. Louis than they would be direct.

W. C. Stith, freight traffic manager Missouri Pacific
53 Railway Company:

Tariff I. C. C. A–146, Missouri Pacific Railway and St. Louis, Iron Mountain & Southern freight tariff of Elevation Charges No. 201–B reads as follows:

On shipments grain and seed, carloads, shipped via the rails of these companies, transferred through elevators located at Omaha, South Omaha, Nebr., Atchison, Leavenworth, Kans., Kansas City, St. Joseph,[a] St. Louis, Mo.,[a] East St. Louis, Ill., and Coffeyville, Kans., these companies will pay the cost of transfer (and such other service performed by the elevator included in such charge) not to exceed three-quarters of 1 cent per 100 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking the same rates, or beyond; to points in Arkansas, Louisiana, Texas, and Mexico, provided no previous payment for similar service at the same point has been made thereon; it being further understood that the allowance will run to elevator actually performing the service, regardless of the ownership of the grain or seed.

Note.—The service for which this allowance is made is defined by the Interstate Commerce Commission as follows:

As unloading grain from cars or grain-carrying vessels into a grain elevator and loading it out again after a period of not to exceed ten days, it does not include treatment or grading, cleaning, or clipping of grain; and retention in an elevator beyond ten days becomes storage and is not a part of the service of elevation as that word is used in the statute.

Issued August 28, 1907. Effective October 1, 1907.

This tariff was afterwards corrected by the issue of Tariff 201–D, eliminating the last clause because "the first paragraph states specifically that the cost or the allowance that is made will not only pay for the cost of transfer, but for such other service as the elevator may render, for that price. Now, that service might include some of the functions that are stated in the last paragraph as not being within the meaning of that word allowance."

"No. 201–D is identical with No. 201–B with the exception
56 of the last paragraph. That is eliminated."

(This tariff is not exactly identical, because it includes Council Bluffs, which was not mentioned in the former tariff.)

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[a] Will only govern on shipments destined to Texas points.

The term "or beyond" means "That where the St. Louis rate applies at a point, for instance, intermediate between Kansas City and St. Louis, then the allowance would be made, and "or beyond" means the business which, if you please, would come through St. Louis going to points beyond, for instance, like a shipment to Philadelphia, which passes over our rails to St. Louis."

58 "On grain that originates in Kansas, that goes through Coffeyville, to reach its destination the elevator allowance is made up to Coffeyville." The elevator at Coffeyville substantially belongs to the Missouri Pacific, the publication is made to allow the payment by the railroad company, and the owner of the grain gets no benefit. Ten days' storage are allowed for the three-fourths of a cent, and if the grain remains over this limit an extra charge is made. Tariffs and practices are confined to meeting competitive conditions.

61 On grain from Coffeyville or Kansas City to Westwego an allowance is made, while no allowance is made on grain from St. Louis to Westwego, because the competitive conditions do not require it. The same condition exists with regard to grain to Bald Knob, Ark. The competitive condition is that the grain would otherwise go to other points. This might also apply to St. Louis.

63 Thinks Mr. Crosby's statement covers the case quite thoroughly. Experience is that the elevator allowance is not reflected into the country even when allowance was greater than it is now, which "is the statement made by the grain men, and then again that is verified by the fact that one day one market will make the price and the next day another market will make the price." Then again, the freight rate to Chicago or the Mississippi River point does not always control the price of grain. There are other conditions that are incidental in the price of grain that frequently will control the value of the grain at St. Louis. So the value of the grain at St. Louis does not represent in all cases the freight charge added to the cost of the grain in the country. The market may be very much less relatively than that.

65 Would be glad to see the question of elevation absolutely eliminated. The elevation allowances which are paid by the railroads are caused by the allowances by the Union Pacific at Council Bluffs and Kansas City for the purpose of releasing their equipment.

If the Union Pacific were to discontinue the allowance and the Great Western were to continue granting free elevation, it would create a complication. Thinks it would be fair to have a reasonable price fixed for the service performed by a railroad elevator. The allowance of the Missouri Pacific is entirely on outgoing grain.

The three-fourths of a cent allowance at St. Louis on grain bound for Texas points would be paid on any grain shipped from St. Louis, whether from Kansas, Nebraska, or Illinois. Understands that an allowance is made by roads to southeastern points, on grain brought in from markets east of the river. Would pay no allowance on grain from Coffeyville to Kansas City. Pays no allowance on Union Pacific grain. Does pay allowance on any grain that has not received an allowance and a check is kept in Kansas City as to where grain came from. "There are a great many advantages which the railroads derive from employing elevators. Frequently cars are in bad order and have to be transferred; then again, cars are transferred for the purpose of consolidating and increasing the tonnage of outbound movements. When the consolidation arrangement was first inaugurated in Coffeyville and a record kept of the transfers, it showed the first six months saved about 14½ per cent in equipment through the consolidation of loads, and that is a very desirable thing for a transportation company to get the benefit of."

Grain from Coffeyville goes mostly to Westwego for export which is 600 miles. Missouri Pacific prefers to have grain from Kansas go to southern destinations from Kansas City, rather than have it hauled through to St. Louis. Have not as great assurance of getting grain out of St. Louis as Kansas City, for most of it goes to East St. Louis and the cars leave the line of the Missouri Pacific. Missouri Pacific earns just the same amount either way.

Some of the elevators at Omaha are operated by grain dealers; the same is true of Atchison. At Leavenworth the elevator belongs to the railroad company. At Kansas City they pay all elevators the allowance, but the principal one used there belongs to the railroad company and no allowance goes to the dealer. Ten days' storage is allowed and a regular schedule of prices for handling grain is in force.

A man who is not engaged in the elevator business at Omaha and a man who is not engaged in that business at St. Louis are on a parity, except that the man in Omaha may pass his grain through the railroad elevator free of charge and the man at St. Louis would have to pay an elevator, but this service is not the same so far as the railroad is concerned. Transfer by shovel, which was formerly used, was a very cumbersome process. It delayed the equipment both in and out bound.

Q. Is there any necessity for transfer at the Missouri River which does not exist here in St. Louis?—A. There is so far as our line is concerned.

Q. And why, state fully?—A. Because at Kansas City it is an intermediate market on our rails, and when we get to St. Louis we are through with it. The practice of the Missouri Pacific is to pay only one elevator allowance.

F. A. LELAND, assistant general freight agent, Missouri, Kansas & Texas:

82 Missouri, Kansas & Texas pays allowance at both St. Louis and Kansas City. It is paid at St. Louis only to Texas and a few Louisiana points for the reason that rates from St. Louis to those points are the same as from Kansas City, and it is believed the shipper at St. Louis ought to be placed in a position to compete with the shipper at Kansas City. It makes no difference where the grain originates. Missouri, Kansas & Texas carries very little grain out of St. Louis to markets other than those in Texas, and that under rather unusual market conditions.

As to the adjustment of rates from points on lines in Kansas to Texas, the rates are adjusted substantially as testified by Mr. Crosby.

85 Would pay elevation charge at Kansas City even though grain was loaded out of an elevator at Kansas City.

Q. As I understand, a man could ship grain from Omaha, and then to St. Joe and Leavenworth, and get an elevation charge at each point. Could he do that?—A. I don't know; he could get the elevator charge from us after he gave us the grain, but would have to pay local rates from each point. These elevator allowances are made to meet competition.

Even if we paid on the inbound movement or reduced the rates from St. Louis to Arkansas points, it would not affect the situation so far as our railroad is concerned, and so far as the grain we handle out of St. Louis is concerned, for the reason that to the points that handle grain from St. Louis our rates are the same as from Kansas City, and necessarily the total charge from Kansas to Texas or other southern destinations is the amount from Kansas City to St. Louis greater than what the same would be if the grain moved from St. Louis to Texas.

If grain is carried to St. Louis as its destination, no allowance is made if it is shipped out of St. Louis over the Missouri, Kansas
87 & Texas rails. All allowances for elevation at Kansas City or St. Louis are on outbound movements. Would be very glad to see allowance for elevation abolished.

In the event of a second allowance at Kansas City when grain is shipped from Omaha to Kansas City, it is made on the basis of the local rate from Kansas City to destination. Does not know of any elevation allowance on grain from Omaha to Kansas City. Does not pay elevation allowance if a similar allowance has been paid by any line at the same point. The allowance was made at St. Louis to Texas points to meet an allowance made at Kansas City by the Santa Fe and Rock Island.

The theory on which the allowance by the Rock Island or any other line is made at Kansas City or Omaha is, as witness understands it, "that unless the inbound line competing with the Union Pacific would make a similar allowance with the Union Pacific, grain which would pay a lesser charge would have some advantage in moving over other lines to Texas over the grain which might originate on the Burlington or Missouri Pacific or Rock Island in competition with the Union Pacific."

91 E. K. VOORHEES, general freight agent St. Louis & San Francisco Railroad Company:

The method of adjustment of rates on the Frisco are substantially the same as on the B lington, Missouri Pacific, and Missouri, Kansas & Texas, but in southeastern Kansas rates to St. Louis are made lower than the combination on the Missouri River. Make allowance of three-fourths of a cent out of Kansas City on grain received from elevators and make no allowance on inbound movement. Grain consigned from Kansas points to St. Louis does not go through Kansas City except perhaps from some point near by.

Rules on the Frisco as to elevation are explained in Circular I. C. C. No. 5553.

Has lines leading southeast of St. Louis and pays three-fourths of a cent on grain out of St. Louis. The southeast territory is east of the main line of the Mobile & Ohio and south of the Memphis division of the Southern Railroad. The payment of allowance is result of competitive conditions, and the Frisco would be glad to take them out if it could do so and still do a fair share of the business. Other lines out of St. Louis pay the allowance. The allowance on southeastern territory has been made from Ohio River points, Louisville, Evansville, Cairo, and Memphis, for fifteen or twenty years, and some eight years ago it was extended to St. Louis. This allowance does not apply to Mississippi Valley points or Arkansas or Texas.

St. Louis & San Francisco Railroad Company tariff.—Item 31—c, effective August 24, 1907, in amendment No. 23, to I. C. C. No. 5553. (E–725 Reissue.) (Issued under special permission of I. S. C. C. No. 2588, dated August 15, 1907.)

In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this company will pay at Kansas City, Mo.:

Three-fourths of 1 cent per 100 pounds on grain shipped over the St. Louis & San Francisco Railroad Company (except on grain destined Ashdown, Gravett, Ark.; Gulfton, Hume, Neosha, Mo., Poteau and Westville, Ind. T., or grain which receives milling-in-transit privileges).

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the grain has been forwarded over the St. Louis & San Francisco Railroad Company.

No payment will be made where only a switching service is performed.

The term "Kansas City" is understood to include elevators located at Kansas City, Kans., Armourdale, Kans., Argentine, Kans., Rosedale, Kans., Turner, Kans., Coburg, Mo., all of which are located in the Kansas City terminal district.

Effective August 1, 1907, in amendment No. 14 to I. C. C. 5553. (E–373, Reissue.)

On outbound shipments of corn products handled through warehouses or elevators on the Frisco tracks at Kansas City, Mo., or Rosedale, Kans., this company will assume transfer charge not to exceed $1.50 per car.

St. Louis & San Francisco Railroad Company tariff.—Item 42–B, effective October 21, 1907, in amendment No. 24 to I. C. C. No. 5553.

The St. Louis & San Francisco Railroad will join interested lines in absorbing elevation allowances shown below on revenue basis.

A. At Cairo, Ill., Evansville, Ind., Henderson, Louisville, and Uniontown, Ky.

On grain, in carloads shipped to points in territory outlined below, three-fourths of 1 cent per 100 pounds to cover the cost of elevation, at Cairo, Ill., Louisville, Henderson, and Uniontown, Ky., and Evansville, Ind., will be paid to shippers.

TERRITORY.

Points east of the Mobile & Ohio Railroad from Mobile, Ala., to Corinth, Miss. (not including Aberdeen or Columbus, Miss.), and on and south of the Southern Railway, Corinth, Miss. (but not including Corinth), to Chattanooga, Tenn., inclusive, also points shown in southeastern and Carolina territories as described in Joint Tariffs, 230 series (Current I. C. C. No. 5339) and 231 series (Current I. C. C. No. 4764).

B. Memphis, Tenn. Refer to Joint Tariffs Nos. 230 series (Current I. C. C. No. 5339), 761 series (Current I. C. C. No. 5340), 231 series (Current I. C. C. No. 4764), and 262 series (Current I. C. C. No. 4837), (to Carrolton Short Line Railway stations only), or subsequent issues, and note that rates named therein on grain carloads when destined southeastern and Carolina points, and Pensacola, Fla., will include

the payment to elevator, mill, or warehouse companies at Memphis, Tenn., of three-fourths of 1 cent per 100 pounds on grain for elevator, loading, or transfer charge.

The above allowance will be made only on grain handled through elevators or warehouses when the service is actually performed.

The Louisville & Nashville Railroad will participate in above charge on shipments to Pensacola, Fla.

C. At St. Louis, Mo., or East St. Louis, Ill., to southeastern territory.

Grain in carloads, shipped from St. Louis or East St. Louis and consigned through to points of destination east of the line of the Mobile & Ohio Railroad, Corinth to Mobile (not including Aberdeen and Columbus, Miss.) on and south of the Memphis Division of the Southern Railway, Corinth to Chattanooga (not including Corinth), east of the line of the Cincinnati, New Orleans and Texas Pacific Railroad, Chattanooga to Isham, and south of the southern boundary line of the States of Kentucky and Virginia, transferred through the elevators in St. Louis or East St. Louis, the maximum amount that will be paid by this company for transfer or elevation is three-fourths of 1 cent per 100 pounds, provided that no change of consignee or destination is made en route either at Ohio or Mississippi rivers or south or east thereof. The amount allowed for transfer or elevation to be paid only on presentation of certificates of the elevators showing that the service was actually performed. (E 725 and 1312.)

H. GOWER, freight traffic manager of the Chicago, Rock Island & Pacific Railroad Company:

96 The Rock Island occupies substantially the same territory as that occupied by the other lines defendant to this petition. Situation as to the payment of rates and elevation is substantially the same except those lines that pay out of St. Louis. Rock Island has no lines out of St. Louis to the southeast or to Texas. Thinks testimony of Mr. Crosby covers entire lines of Rock Island. Would be glad to take out the allowances if possible. They are made because of competitive conditions. Rock Island would ignore the Union Pacific competition if other lines would. The effect of lowering the rate to St. Louis three-fourths of a cent would be that either Kansas commission would lower rates in Kansas or companies east of Missouri River having no rails west of the Missouri River would reduce the rates east of the river.

98 The Chicago Great Western, the Chicago, Milwaukee & St. Paul, and the Chicago & North Western have lines running east of the river and pay this elevation charge at Kansas City, but do not enter St. Louis.

99 W. S. WASHER, secretary and treasurer of the Washer Grain Company, Atchison, Kans.:

Owns and operates an elevator at Atchison, engaged in buying and selling grain at points in Kansas and Nebraska. In making purchases, bids are made conditional upon weights, grades, and inspection, and in order to ascertain the correct weight of grain it is necessary to elevate it at Atchison. Practically all purchases of grain are unloaded into the elevator at Atchison. It is part of the company's business to have the grain unloaded so as to inspect and know the grade of grain. Until recently did not receive elevator allowance, and during the time when not receiving it felt the competition of other Missouri River dealers who were having their grain handled free, because they were able to handle their grain to much better advantage. Practically all grain bought by the Washer Grain Company is on Atchison terms, which means Atchison weights and grades. So far as the shipper is concerned Atchison is the destination. Very little grain is received on consignment.

103 Sells grain at St. Louis, very largely in the south and southeast, in Memphis, and at Gulf ports. Some is sold for export occasionally. Very little is sold at St. Louis and Chicago. Occasionally sell in Texas, but southeast is the principal market.

Does not consider three-fourths of a cent a compensating allowance as compared with the free elevation of competitors. Does not consider that it pays the expense and interest on value of plant. Free elevation is allowed at Coffeyville and Leavenworth, Kans.

Would rather have free elevation than own an elevator and receive the three-fourths of a cent.

At the time the free elevation was allowed the grain of the Washer Grain Company had the same rates in the elevators at Kansas City as the grain of others, but this left nothing for the investment in the elevator.

Q. As a grain dealer without an elevator would you prefer free elevation, or would you prefer to pay three-quarters of a cent a hundred on your grain?—A. That would be immaterial to me so long as others in my line of business were on an equal basis.

If the elevator allowance and free elevation were discontinued, the price paid to the producer would be reduced.

BRUCE INMAN represents the Milliken Commission Company
110 of St. Louis in purchasing grain in Nebraska and Iowa, with an office at Omaha: As no allowance is made at St. Louis this company is at a disadvantage in buying grain to the extent of the three-fourths of a cent, and the Omaha buyer can pay three-fourths of a cent more for grain in the country than this company can. It is the rule and practice at Omaha that grain received at that market

shall be weighed and inspected there, which means the unloading of all cars. Has known of instances where Omaha dealers were bidding in the country just what they could sell for in the market, and the explanation would seem to be that they could make a little money out of the three-fourths of a cent elevation allowance. Grain is bought for this company on St. Louis weights and grades. Thinks there is little preference of producers for one market or the other on this account. Some prefer a market a little closer home. Grain is sent to both St. Louis and Omaha to be sold on commission.

Thinks that even if the cost of operating the elevator is three-fourths of a cent the Omaha dealer still has an advantage in
116 that he has the elevator facilities for nothing. Thinks if dealer shipping grain to St. Louis gets a free elevator service in St. Louis, or gets three-fourths of a cent per 100, the position would be equal. Does not know anything about the allowance on grain going to the southeastern territory, as does not know anything about
118 that end. The Milliken Helm Commission Company is in the elevator business.

120 GEORGE F. POWELL, grain dealer, St. Louis, Mo.: Buys grain in Nebraska for shipment to St. Louis. Comes in competition with Missouri River bidders and others. Missouri River dealers sell in the same markets with the St. Louis dealers, and any advantage they get at the river puts the St. Louis dealer to a corresponding disadvantage. Operates through the public elevators at St. Louis. Purchases on St. Louis weights and inspection, and in order to ascertain the weights the grain has to go into an elevator. Pays elevator company one-half cent a bushel, which covers ten days' storage. Railroads contribute nothing toward the expense in the elevator. Dealers at the river receive a contribution for the elevation of grain if it is handled through an elevator on outbound shipments. Does not buy grain at Kansas City and Omaha because the dealers there sell
122 directly to the markets he wishes to sell to. Considers 1 cent a bushel a reasonable profit for handling grain. This is a fair net profit out of which is paid office and incidental expenses. Until within the previous month was a regular bidder in Nebraska. Recently, because of bad car situation at St. Louis, has not been bidding.

The Missouri River dealer buys in competition with St. Louis dealers and also sells in competition with them, and has the advantage in buying and selling of the three-fourths of a cent. Sells largely in Cuba, exporting through Mobile, Ala. Rate from East St. Louis to Mobile is 12 cents per 100 on domestic business. On export business it is part of a through rate. No elevation is made on the export business. Does considerable business at Louisville, Ky., with grain dealers and gets no allowance on that. Meets competition of Missouri River dealers

at Louisville and Cincinnati. Three-fourths of a cent practically pays the operation expenses of an elevator.

In speaking of no allowance being made to St. Louis, it was meant no allowance on the inbound movement.

Q. You spoke of a difference in price at the Missouri
127 River, the inference being that that difference was occasioned entirely by the elevation charge. How do you account for the difference between Omaha and Kansas markets of a cent to a cent and a half a bushel?—A. Market conditions. There are other conditions besides the elevator allowance which have an effect on prices.

Q. The same thing would be true as to the market in St. Louis as compared with Kansas City. They are often entirely out of line on freight rates?—A. Yes; there are other conditions which affect the prices.

Dealers at St. Louis distribute grain to the Southeast, the Mississippi Valley, export considerable quantity to Cuba, and sell a good deal to the Southwest, principally Texas. The one-half of a cent charge at St. Louis includes just the transfer and ten days' storage.

M. W. COCHRANE, the Cochrane Grain Company, of St. Louis. Engaged in buying and shipping grain at St. Louis; attempting to buy grain in Kansas, Nebraska, and Iowa, Nebraska especially. Sells grain largely to Cincinnati and Louisville, possibly three-fourths of the grain is sold to those markets. Receives no elevation allowance on grain to those markets. At those markets come in competition with Omaha grain buyers and buyers from other Missouri River points.

Attempts to get the virgin grain from farmers by purchasing at country stations. Handles grain through elevators at St. Louis. The rate to Louisville from Friend, Nebr., via Omaha and via St. Louis, is 22½ cents, and the Omaha man has the advantage over the St. Louis man through the elevator allowance, because at St. Louis the dealer has to pay one-half cent for elevation, which is paid for at the Missouri River by the railroads. Considers 1 cent a bushel a fair average profit for handling grain, over and above expenses. To meet the Omaha competition, St. Louis dealers will be fortunate to clear one-half a cent.

MARSHALL HALL, president of the W. L. Green Commission
134 Company. Experience of the Green Commission Company has been substantially the same as that of Mr. Cochrane. Previously operated an elevator at St. Louis, but do not now. This was the Burlington elevator. At that time the railroads were making an elevation allowance of 1¼ cents per 100 pounds. While operating that elevator agreed or proposed to sell to an exporter of grain at

the same price for which he purchased it on the floor at St. Louis, figuring on making a profit on the elevation allowed by the road.

Competes mostly with Omaha buyers for Omaha elevators. In the country Omaha buyers bid as high or higher than the St. Louis buyers and the St. Louis buyers have to pay more for the grain because the producer or shipper would rather sell to the Omaha house because he can get quicker returns and will not be out the use of his money so long. Missouri River markets have a natural
137 advantage in location. Omaha dealer frequently offers grain for less than Green & Company are bidding in the country. Green Commission Company receive no allowance on grain forwarded to the Gulf ports. Have been unable to do export business because they can not meet the competition of Omaha and Kansas City. The elevation charge is one element that enters into the question, and another is the car situation at St. Louis, and the rate adjustment is in favor of Kansas City and Omaha, especially in southern Kansas.

The Missouri River shipper can ship his grain to New Orleans for export at three-quarters of a cent a hundred less than the St. Louis dealer. Green & Company only get in the market when they are willing to take a chance and buy grain, because they think they can sell it better, or at times when business is light they get favorable orders from some of their own customers. Missouri River dealers sell a great deal of grain for export through New York and Baltimore, while very little grain goes out of St. Louis to eastern destinations.

Green Commission Company comes into competition with buyers on the Missouri River in buying grain in Kansas and Nebraska.

"We have got to pay net to the grain shipper at least as much as he can obtain for his grain from the Missouri River dealer, and in addition to that we have got to pay the full rate from the point of origin to St. Louis, and in addition to that we have got to pay the elevator charge at St. Louis for handling our grain and transferring it into the cars where we have to ship it." The Missouri River dealer gets an allowance, which helps pay his elevator expenses. In actual result the Missouri River dealer pays three-fourths of a cent less than the tariff calls for in hauling grain to St. Louis.

In 1903 or 1904, or both, the Green Commission Company were operating the elevator at St. Louis. A great many times they sold grain on the floor of the exchange at St. Louis for what they paid for it, getting their profit from the elevation allowance. This was done when no more profitable business was offered. Mr. H. B. Richardson is president of the Burlington elevator now. Mr. Hall was formerly an officer of that company.

145 Is opposed to the allowance because it nearly always is a source of discrimination. Would not be satisfied with an allowance of three-fourths of a cent on outgoing movements, because sometimes the orders are from St. Louis, and the Omaha men can

"accumulate grain and sell it to our St. Louis industries against us." They accumulate the grain in elevators at Omaha on account of the allowance received from the railroads. St. Louis dealer could accumulate grain if he had the allowance.

150 Does not think the disadvantage to St. Louis grows out of location, but out of a disposition on the part of the railroads to favor one locality against another.

Omaha grain dealers are attempting to sell their grain to consumers in St. Louis in competition with St. Louis dealers. If the Omaha man sells grain to the Corn Products Company, for instance, they are able to have that grain transported from Omaha for 8 cents per 100 and get an allowance of three-fourths of a cent at Omaha, therefore the net charge for transportation is 7¼ cents, while when the St. Louis dealer brings the grain it costs him 8 cents and he receives no elevation allowance.

The Omaha dealer can make a product that the Corn Products Company would buy by mixing his grain through an elevator. Omaha dealers sell direct to industries in St. Louis frequently, and perhaps 50 per cent of the wheat for mills comes from Kansas City; is bought from Kansas City dealers. More grain for mills is bought from Kansas City dealers than St. Louis dealers.

151 All the grain that comes to St. Louis is not passed through the elevator. A large portion is loaded at the Missouri River and sold direct to destination, not going through an elevator. Probably all grain that is purchased in Nebraska and consigned to the company in St. Louis and sold in Louisville goes through an elevator. The Burlington Railroad will not allow their cars to be reloaded at the Burlington elevator, because eastern lines are short of cars, but is willing for their cars to run through to destination. In a good many instances cars go through. Specific quantities and grades can only be made up by reloading in an elevator. Sending the grain through the elevator is in the interest of the grain business, and not a transportation necessity, but can understand why a railroad would like to have its equipment released.

It is an advantage to an elevator to handle the grain through the elevator to make the grain conform to what the trade wants.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for complainants.

F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.

ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

O

291 Afterwards, to wit, on the 26th day of November, 1909, a Replication was filed. Said Replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405.

F. H. PEAVEY & COMPANY et al., Complainants,
vs.
UNION PACIFIC RAILROAD COMPANY et al., Defendants.

Replication.

The complainants, as replicants, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncerta-nties and insufficiencies of the answer of the defendants, and each of them, for replication thereunto *saith* that they *doth* and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by these replicants, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.

292 Afterwards, to-wit, on the 15th day of April, 1910, an exhibit was filed.
Said exhibit is in words and figures as follows, to-wit:

Interstate Commerce Commission,
Office of the Secretary,
Washington.
Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the sheet hereto attached contained a true and correct extract from Supplement No. 69 to St. Louis & San Francisco Railroad Company Freight Tariff I. C. C. No. 5553, filed with the said Interstate Commerce Commission on July 20, 1909.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 4th day of December, A. D., 1909.

[SEAL.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

293 *Extract from Supplement No. 69 to St. Louis & San Francisco Railroad Co. Freight Tariff I. C. C. No. 5553, Filed on July 20, 1909.*

Page 5. Section 2—Continued.

Milling in Transit and Special Rules.

Item No.	Subject.	Instructions.
31–H Cancels 31–G.	Absorption of transfer charges on grain and corn products handled through elevators at Kansas City, Mo., and Rosedale, Kan.	Re-issue; effective July 14, 1909, in Supplement No. 65. In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this Company will pay at Kansas City, Mo. Three-fourths of one cent per 100 lbs. on Grain and Seeds shipped over the St. Louis & San Francisco Railroad Company. This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence: (1) That the transaction is in line with the ruling of the Interstate Commerce Commission. (2) That no other payment of this character has been made. (3) That the Grain and Seeds have been forwarded over the St. Louis & San Francisco Railroad *Co.* No payment will be made where only a switching service is performed. The term "Kansas City" is understood to include elevators located at Kansas City, Kan., Armourdale, Kan., Argentine, Kan., Rosedale, Kan., Turner, Kan., Coburg, Mo., Harlem, Mo., all of which are located in the Kansas City Terminal District.

294 Afterwards, to-wit, on the 15th day of April, 1910, an exhibit was filed.

Said exhibit is in words and figures as follows, to-wit:

Interstate Commerce Commission,
Office of the Secretary,
Washington.
Edward A. Moseley, Secretary.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the documents hereto attached, are true copies of schedules more particularly hereinafter described, filed with the said Interstate Commerce Commission on dates specified below, to-wit:

Chicago, Rock Island & Pacific Railway No. 23267-B, I. C. C. No. C-8489, filed on May 19, 1908.

Chicago, Rock Island & Pacific Railway I. C. C. No. C-8488, filed on May 19, 1908.

Chicago, Burlington & Quincy Railroad Co. I. C. C. No. 9277, filed on December 1, 1908.

Chicago, Burlington & Quincy Railroad Company I. C. C. No. 9275, filed on December 1, 1908.

Chicago, Burlington & Quincy Railroad Company, I. C. C. No. 9276, filed on December 1, 1908.

Union Pacific Railway Company Circular G. F. O. No. 933, I. C. C. No. 2207, filed on October 24, 1908.

Missouri, Kansas & Texas Railway Company Freight Tariff I. C. C. No. A-3248, filed on June 17, 1909.

The Missouri Pacific Railway Company Freight Tariff I. C. C. No. A-1050, filed on June 25, 1909.

The Missouri Pacific Railway Company Freight Tariff I. C. C. No. A-1284, filed on November 17, 1909.

Missouri, Kansas & Texas Ry. Co. Freight Tariff I. C. C.
295 No. A-3327, filed on November 5, 1909.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 4th day of December, A. D., 1909.

[SEAL.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

296 No Supplement will be issued to this publication.
I. C. C. No. C-8489.
Cancels I. C. C. No. C-8456.

Rock Island.

Chicago, Rock Island & Pacific Railway.

C., R. I. & P. No. 23267-B.

(Cancels No. 23267-A.)

Issued May 18, 1908. Effective June 27, 1908.

In accordance with the authority of the Inter-state Commerce Commission, in case No. 687, this Company will pay at Leavenworth, Kas., Atchison, Kas., Elwood, Kas., and St. Joseph, Mo.,

Three-fourths of One Cent per 100 pounds on Grain or Seeds, carloads, shipped over the Chicago, Rock Island & Pacific Railway.

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the Grain or Seeds have been forwarded over the Chicago, Rock Island & Pacific Railway.

No payment will be made where only a switching service is performed.

H. GOWER,
F. T. M. Rock Island Lines, Chicago, Ill.
H. H. EMBRY,
G. F. A. C., R. I. & P. R'y, Kansas City, Mo.
T. H. SIMMONS,
G. F. A. C., R. I. & P. R'y, Chicago, Ill.

Issued by

F. J. SHUBERT,
A. G. F. A. C., R. I. & P. R'y, Chicago, Ill.

2000.
O.
(C. F. No. 8683.)

297 C., B. & Q. I. C. C. No. 9277.
Supersedes I. C. C. No. 9218.

No Supplement other than cancellation will be issued to this Tariff.

C., B. & Q. G. F. O. No. 1999-G.
Supersedes G. F. O. No. 1999-F.
Quincy Route Tariff No. 1237-E.
Supersedes Tariff No. 1237-D.

Burlington Route.

Chicago, Burlington & Quincy Railroad Co.

Quincy, Omaha & Kansas City R. R. (FX-5 No. 23.)

Allowance for Transfer of Grain and Seeds.

Taking Effect January 1, 1909.

Account Postponement of Order of Interstate Commerce Commission in Case No. 1239 et al., Dated November 25, 1908.

On Grain and Seeds shipped via the Chicago, Burlington & Quincy Railroad or Quincy, Omaha & Kansas City R. R., transferred through elevators at points named in list below, these Companies will pay cost of transfer, and such service as elevator doing the transfer includes in that service, not to exceed three-quarters (¾)

of one cent per 100 pounds, when destination is point on the Mississippi River, (or points west thereof taking same rates) or beyond.

Transfer Points Above Referred To.

Council Bluffs, Iowa.	St. Joseph, Mo.	Nebraska City, Neb.
Omaha, Neb.	Atchison, Kas.	Rulo, "
South Omaha, "	Leavenworth, "	Lincoln, "
Kansas City, Mo.	Elwood, "	

Same allowance will be made at Omaha or South Omaha, Neb., Nebraska City, Neb., or Council Bluffs, Iowa, on Grain or Seeds which are transferred through elevators at points named and pay the C., B. & Q. R. R. the local or proportional rates from these points, where destination is St. Joseph, Mo., Atchison, Kas., Leavenworth, Kas., Kansas City, Mo., or points beyond.

Payment will be made only to elevators actually performing the service, regardless of the ownership of the grain or seeds.

298 No payment will be made where a similar payment has been or will be made on the same grain or seeds.

Issued November 30, 1908, by

W. B. HAMBLIN,
General Freight Agent C., B. & Q. R. R. Co., Illinois and Iowa Districts, Chicago, Ill.
W. GRAY,
General Freight Agent C., B. & Q. R. R. Co., Missouri District, St. Louis, Mo.
GEO. H. CROSBY,
Freight Traffic Manager C., B. & Q. R. R. Co., Chicago, Ill.
C. E. SPENS,
General Freight Agent C., B. & Q. R. R. Co., Lines West of Missouri River, Omaha, Neb.

(C., B. & Q. File No. 50451.)
(T. D. 408.)
A. E. C.
(H. P. Co.-1000-B 6907.)

299 No Supplement will be issued to this publication.
I. C. C. No. C-8488.
(Cancels I. C. C. No. C-8463.)

Rock Island.

Chicago, Rock Island & Pacific Railway.

C., R. I. & P. No. 23266-C.

(Cancels No. 23266-B.)

Issued May 18, 1909. Effective June 27, 1908.

In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this Company will pay Kansas City, Mo., Omaha, South Omaha, Neb. and Council Bluffs, Iowa.

Three-fourths of One Cent per 100 pounds on Grain or Seeds, carloads, shipped over the Chicago, Rock Island & Pacific Railway and the St. Louis, Kansas City & Colorado Railroad.

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the Grain or Seeds have been forwarded over either the Chicago, Rock Island & Pacific Railway or the St. Louis, Kansas City & Colorado Railroad.

No payment will be made where only a switching service is performed.

The term Kansas City is understood to include elevators located at Kansas City, Kas., Armourdale, Kas., Argentine, Kas., Rosedale, Kas., Turner, Kas., and Coburg, Mo., all of which are located in the Kansas City Terminal District.

Issued by

F. J. SHUBERT,
A. G. F. A., C. R. I. & P. R'y, Chicago, Ill.

300 H. GOWER,
F. T. M. Rock Island Lines, Chicago, Ill.
H. H. EMBRY,
G. F. A. C. R. I. & P. R'y, Kansas City, Mo.
T. H. SIMMONS,
G. F. A. C. R. I. & P. R'y, Chicago, Ill.

301 No Supplement other than Cancellation will be issued to this tariff.

C., B. & Q. I. C. C. No. 9275.
Supersedes I. C. C. No. 9233.

C., B. & Q. G. F. O. No. 2545-E.
Supersedes G. F. O. No. 2545-D.

Burlington Route.

Chicago, Burlington & Quincy Railroad Co.

Missouri, Kansas & Texas Railway (FX-4, No. 12.)

Missouri, Kansas & Texas Railway of Texas (FX-4, No. 12.)

Allowance for Grain Transfer.

Taking Effect January 1, 1909.

Account Postponement of Order of Interstate Commerce Commission in Case No. 1239 et al., Dated November 25, 1908.

On shipments of grain and seeds shipped via the Chicago, Burlington & Quincy R. R., Kansas City, Mo., and Missouri, Kansas &

Texas Ry., or its connections, and transferred through elevator at St. Joseph, Mo., Atchison, Leavenworth or Elwood, Kas., the companies named will pay cost of transfer (and such service as elevator doing the transfer includes in charge) not to exceed three quarters (¾) of one cent per 100 pounds when destination of shipments is points in Texas or Louisiana or competitive points in Missouri, Kansas, Indian Territory or Oklahoma, named in following joint tariffs or subsequent issues:

Tariffs.

	I. C. C. No.	C., B. & Q. G. F. O. No.
F. A. Leland's Texas Tariff No. 32-G.	512	2643-B (Texas).
F. A. Leland's S. W. L. Tariff No. 47.	534	4229-A (Louisiana).
M., K. & T. No. 4106.	A-3127	1309-G (New Orleans, etc.).
" 4096.	A-3125	267-B (Mo., Kas., Ind. Ter. & Ok., etc.).
" 3712-F.	A-2969	1043-D (Galveston, export).

Payment will be made only to elevators actually performing the service, regardless of ownership of the grain or seed.

No payment will be made where a similar payment has been made on same grain or seeds at same point by some other carrier.

302 Divides as per Division Sheet No. 1 for Tariff.

Issued November 30, 1908 by

W. B. HAMBLIN,
General Freight Agent C., B. & Q. R. R. Co., Illinois and Iowa Districts, Chicago, Ill.
W. GRAY,
General Freight Agent C., B. & Q. R. R. Co., Missouri District, St. Louis, Mo.
GEO. H. CROSBY,
Freight Traffic Manager C., B. & Q. R. R. Co., Chicago, Ill.
C. E. SPENS,
General Freight Agent C., B. & Q. R. R. Co., Lines West of Missouri River, Omaha, Neb.

(C., B. & Q. File No. 50449.)
T. D. 408.

303 No supplement other than cancellation will be issued to this tariff.
C., B. & Q. I. C. C. No. 9276.
Supersedes I. C. C. No. 9232.

C., B. & Q. G. F. O. No. 2563-F.
Supersedes G. F. O. No. 2563-E.

Burlington Route.

Chicago, Burlington & Quincy Railroad Co.
Kansas City Southern Railway (FX-4, No. 35.)

Allowance for Grain Transfer.

Taking Effect January 1, 1909.

Account Postponement of Order of Interstate Commerce Commission in Case No. 1239 et al., Dated November 25, 1908.

On shipments of Grain and Seeds shipped via the Chicago, Burlington & Quincy R. R., Kansas City, Mo., and Kansas City Southern Railroad or its connections, and transferred through elevator at St. Joseph, Mo., Atchison, Leavenworth or Elwood, Kan., the companies named will pay cost of transfer (and such service as elevator doing the transfer includes in charge) not to exceed three-quarters (¾) of one cent per 100 pounds when destined to points to which rates are named in following joint tariffs or subsequent issues:

Tariffs.

	I. C. C. No.	C., B. & Q. G. F. O. No.
F. A. Leland's Texas Tariff No. †32-G.	512	2643-B (Texas).
F. A. Leland's S. W. L. Tariff No. 47.	534	4229 A (Louisiana).
K. C. S. No. 1393-D.	2185	1249-B (Arkansas, etc.).
" 1491-D.	2186	1245-B (Arkansas, etc.).
" § 1.	2188	1368-A (K. C. S. points).
" 810-D.	2149	1247-A (Ft. Smith, Ark.)
" 49-A.	2321	2181-B (Ft. S. & W. Ry., etc.).
" 36-A.	2281	1242-D (Shreveport, etc.).
" 2154.	2369	3746-A (Texarkana).

Payment will be made only to elevators actually performing the service, regardless of ownership of the Grain or Seed.
No payment will be made where a similar payment has been made on same Grain or Seeds at same point by some other carrier.

Divides as per Division Sheet No. 1 for Tariff.

304 † Will not govern on shipments to local points on Texarkana & Ft. Smith Ry.

§ Governs in connection with Tariff No. 1 or subsequent issues, only when to junction points as named in same.

Issued November 30, 1908, by

W. B. HAMBLIN,
General Freight Agent C., B. & Q. R. R. Co., Illinois and Iowa Districts, Chicago, Ill.
W. GRAY,
General Freight Agent C., B. & Q. R. R. C., Missouri District, St. Louis, Mo.
GEO. H. CROSBY,
Freight Traffic Manager C., B. & Q. R. R. Co., Chicago, Ill.
C. E. SPENS,
General Freight Agent C., B. & Q. R. R. Co., Lines West of Missouri River, Omaha, Neb.

(C., B. & Q. file No. 50450.)
T. D. No. 408.

305 I. C. C. No. 2207.
Cancels No. 2189.

In lieu of I. C. C. No. 2189 rejected by Interstate Commerce Commission.

Circular G. F. O. No. 933.

Cancels No. 929.

Union Pacific Railroad Company.

Allowance to Elevators Located at Council Bluffs, Ia., and Kansas City, Kan., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at the termini and upon the tracks of the Union Pacific R. R., at Council Bluffs, Ia., and Kansas City, Kan., subject to the following conditions:

1st. The grain must originate at points on the Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, Munice and Hund, Kan., and be transported by Union Pacific R. R. from such originating points to Council Bluffs, Iowa, or Kansas City, Kan., respectively.

2nd. The allowance will apply only on Grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, and the release of the empty cars. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators.

4th. Elevator Companies, in presenting their claims for the above allowance, must substantiate, by duly certified records of connecting lines, the reshipment of the grain to points beyond, as above

outlined, same to be subject to verification by the Union
306 Pacific R. R. Co.

5th. No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made. The reasons for this circular are that the Interstate Commerce Commission upon June 29, 1908, ordered that no such payments should be made. The owners of these elevators claim, however, that Union Pacific Railroad Company is bound to make the payments under long existing contracts and threaten suit under the same. This circular is therefore made to preserve all the rights of the parties and still comply with the Order of the Commission, thus enabling the questions presented to the Commission to be ultimately determined by the courts.

Issued and Mailed to I. C. C. Oct. 23, 1908.
Effective Dec. 2, 1908. By J. A. MUNROE,
Freight Traffic Manager Union Pacific Railroad, Omaha, Neb.

307 I. C. C. No. A-3248.
(Issued in lieu of I. C. C. No. A-3226 rejected by I. C. C.)
Cancels I. C. C. No. A-2983.

1000. File 190-1.

(The M., K. and T.)

Missouri, Kansas & Texas Railway Co.

In Connection with the Missouri, Kansas & Texas Ry. Co. of Tex. (FX-4, No. 118).

Freight Tariff.

M., K. & T. Ry. System No. 4202-A.

(Issued in Lieu of Tariff No. 4202, Rejected by I. C. C.)

Cancels M., K. & T. No. 3848-B.
Cancels M., K. & T. of Tex. No. 1661-B.

Naming Elevation Allowance on Grain, Carloads at St. Louis, Mo., and East St. Louis, Ills.

Issued June 16, 1909. Effective June 21, 1909.

(Issued under Special Permission of the Interstate Commerce Commission, No. 9879 of June 10, 1909.)

J. W. ALLEN,
G. F. A. M., K. & T. Ry. Co. of Texas, Dallas, Tex.
J. L. WEST,
A. G. F. A. M., K. & T. Ry. Co., St. Louis, Mo.
W. W. MILLER,
A. G. F. A. M., K. & T. Ry. Co., St. Louis, Mo.
R. W. HOCKADAY,
G. F. A. M., K. & T. Ry. Co. in Kansas, Parsons, Kans.
E. S. BRIGGS,
A. G. F. A. M., K. & T. Ry. Co. of Tex., Houston, Tex.

Issued by W. B. GROSECLOSE,
G. F. A. M., K. & T. Ry. C., St. Louis, Mo.

Mailed I. C. C. June 16, 1909.

308 *Definition of Term Elevation.*

In order to more clearly define the practice of these companies with respect to making allowances for elevation the term "Elevation" is understood to mean unloading of Grain from Cars into an elevator and loading same out again into cars and such other service as may be performed for the amount shown in the following item.

Allowance for Elevation.

On carload shipments of Grain forwarded from St. Louis, Mo., or East St. Louis, Ill., or elevators located within St. Louis or East St. Louis switching limits, an allowance of three-fourths ($\frac{3}{4}$) cents per one hundred pounds will be made by these companies for elevation when destined to points in Texas and to following points in Oklahoma, viz:

Ada, Okla.	Jennings, Okla.	Panama, Okla.
Bartlesville, Okla.	Krebs, Okla.	Prue, Okla.
Bokoshe, Okla.	Kiowa, Okla.	Reynolds, Okla.
Crowder, Okla.	Luther, Okla.	Shawnee, Okla.
Cushing, Okla.	Lehigh, Okla.	Stonewall, Okla.
Coalgate, Okla.	Muskogee, Okla.	Sparks, Okla.
Corretta, Okla.	McAlester, Okla.	Tulsa, Okla.
Dale, Okla.	Meridian, Okla.	Tupelo, Okla
Dewey, Okla.	Midway, Okla.	Verdark, Okla.
Durant, Okla.	Navina, Okla.	Vinata, Okla.
Dustin, Okla.	Nelagony, Okla.	Wagoner, Okla.
El Reno, Okla.	Norfolk, Okla.	Wilburton, Okla.
Fallis, Okla.	Oklahoma City, Okla.	Weleetka Junction, Okla.
Guthrie, Okla.	Polson, Okla.	Warwick, Okla.
Henryetta, Okla.	Phillips, Okla.	Yale, Okla.

The above applies under the following conditions:

No. 1—No similar allowances shall have been made on such Grain by any line.

No. 2—All payments under the above will be made only after check and verification by Chief Inspector Paul P. Ranier, Chicago, Ill., or District Inspector J. M. Ritchey, St. Louis, Mo.

309 No supplements to this Tariff will be issued.
I. C. C. No. A-1050.
(Cancels I. C. C. No. A-789.)
Authority No. F 6235.

The Missouri Pacific Railway Company.

St. Louis, Iron Mountain & Southern Ry. Co. and Leased, Operated, and Independent Lines.

Freight Tariff of Elevation Charges.

No. 201-M.

(Cancels No. 201-L.)

Grain and Seed, Carloads, Transferred Through Elevators Located at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, Iowa, Atchison, Elwood, Leavenworth, Kansas City, Kan., Kansas City, St. Joseph, St. Louis, Mo., East St. Louis, Ill., and Coffeyville, Kan.

Issued June 23, 1909. Effective August 5, 1909.

Issued by

W. B. KNIGHT.
Assistant Freight Traffic Manager, St. Louis, Mo.

Item No. 1.

On shipments of Grain and Seeds, carloads, shipped via the rails of these companies, transferred through elevators at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, Iowa, Atchison, Elwood, Leavenworth, Kansas City, Coffeyville, Kan., Kansas City and St. Joseph, Mo., these companies will pay the cost of transfer
310 (and such other services performed by the elevator included in such charge) not to exceed three-fourths of one cent per 100 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking same rates, or beyond; to points in Arkansas, Louisiana, Texas and Mexico, provided no previous payment for similar service at the same point has been made thereon.

Item No. 2.

The allowance as provided above will also be made at Atchison, Elwood, Leavenworth, Kansas City, Kan., Kansas City and St. Joseph, Mo., when the destination is to the following points, viz:

Anthony, Kan.
Argonia, Kan.
Arkansas City, Kan.
Asbury, Mo.
Aurora, Mo.
Belle Plaine, Kan.
Beloit, Kan.
Benedict, Kan.
Blue Rapids, Kan.
Bridgeport, Kan.
Caney, Kan.
Carterville, Mo.
Carthage, Mo.
Cedarville, Kan.
Cherokee, Kan.
Chetopa, Kan.
Claremore, Okla.
Clifton, Kan.
Clyde, Kan.
Coffeyville, Kan.
Colony, Kan.
Concordia, Kan.
Council Grove, Kan.
Diamond, Mo.
Dodson, Mo.
Elk City, Kan.
Ft. Gibson, Okla.
Ft. Scott, Kan.
Frederick, Kan.
Fredonia, Kan.
Gas, Kan.
Geneseo, Kan.
Godfrey, Kan.
Granby, Mo.
Great Bend, Kan.
Gridley, Kan.
Harrisonville, Mo.
Hazelton, Kan.
Herington, Kan.
Hope, Kan.
Independence, Kan.
Iola, Kan.
Irving, Kan.
Joplin, Mo.
Kanopolis, Kan.
Kellogg, Kan.
Kenneth, Kan.
Kincaid, Kan.
Kingman, Kan.
Kiowa, Kan.
La Harpe, Kan.
Lamar, Mo.
Larned, Kan.
Leeds, Mo.
Le Roy Jct., Kan.
Liberal, Mo.
Lindsborg, Kan.
Lyons, Kan.
Madison, Kan.
Mankato, Kan.
Minden, Mo.
Moran, Kan.
Neodesha, Kan.
Nebada, Mo.
Niotaze, Kan.
Norwich, Kan.
Oronogo, Mo.
Osage City, Kan.
Ottawa, Kan.
Oxford, Kan.
Paola, Kan.
Peru, Kan.
Pittsburg, Kan.
Piqua, Kan.
Pleasonton, Kan.
Polson, Okla.
Quenemo, Kan.
Richards, Mo.
Rich Hill, Mo.
Richter, Kan.
Riverdale, Kan.
Salina, Kan.
Sallisaw, Okla.
Scott City, Kan.
Sherwin, Kan.
Springfield, Mo.
Stafford, Kan.
Topeka, Kan.
Trilby, Kan.
Turon, Kan.
Vining Spur, Kan.
Wagoner, Okla.
Washington, Kan.
Waverly, Kan.
Webb City, Mo.
Wichita, Kan.
Winfield, Kan.
Worland, Mo.

Item No. 3.

The allowance as provided above will also be made at Omaha, South Omaha, Neb., or Council Bluffs, Iowa, when the destination is St. Joseph, Mo., Atchison, Elwood, Leavenworth, Kan., and Kansas City, Mo.

311 Item No. 4.

The allowance as provided above will also be made at St. Louis, Mo., and East St. Louis, Ill., when destined to points in Arkansas, Louisiana and Texas, except will not apply to lower Mississippi Valley Points as named in A. D. Hall's Reshipping Tariff No. 2, I. C. C. No. A-9, (Mo. Pac. Tariff No. 243-A), Supplements thereto or reissues thereof.

Item No. 5.

No allowance will be made on Grain or Seed which has been converted into products thereof.

312 No supplements to this Tariff will be issued except for the purpose of canceling same.

I. C. C. No. A-1284.
(Cancels I. C. C. No. A-1234.)
Authority No. F 8643.

The Missouri Pacific Railway Company.

St. Louis, Iron Mountain & Southern Ry. Co. and Leased, Operated, and Independent Lines.

Freight Tariff of Elevation Charges.

No. 201-P.

(Cancels No. 201-O.)

Grain and Seed, Carloads, Transferred Through Elevators Located at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, *Bluffs,* Iowa, Atchison, Elwood, Leavenworth, Kan., Kansas City, St. Joseph, St. Louis, Mo., East St. Louis, Ill., Cairo, Ill., Kansas City, Kan., and Coffeyville, Kan.

Issued November 16, 1909. Effective December 26, 1909.

Issued by

W. B. KNIGHT,
Chief of Tariff Bureau, St. Louis, Mo.

Item No. 1.

On shipments of grain and seed, carloads, shipped via the rails of these companies, transferred through elevators at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, Iowa, Atchison, Elwood, Leavenworth, Kansas City, Coffeyville, Kan., Kansas City and St. Joseph Mo., these companies will pay the cost of transfer (and such other services performed by the elevator included in such charge) not to exceed three-fourths of one cent per 100
313 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking same rates, or beyond; to points in Arkansas, Louisiana, Texas and Mexico, provided no previous payment for similar service at the same point has been made thereon.

Item No. 2.

The allowance as provided above will also be made at Atchison, Elwood, Leavenworth, Kansas City, Kan., Kansas City, St. Joseph, Mo., Omaha, South Omaha, Neb., and Council Bluffs, Iowa, when destined to competitive points in Missouri, Kansas and Oklahoma; except will not apply when destined Dodson, Independence and Leeds, Mo.

Item No. 3.

The allowance as provided above will also be made at Omaha, South Omaha, Neb., or Council Bluffs, Iowa, when the destination is St. Joseph, Mo., Atchison, Elwood, Leavenworth, Kan., and Kansas City, Mo.

Item No. 4.

The allowance as provided above will also be made at St. Louis, Mo., East St. Louis, Ill., and Cairo, Ill., when destined to points in Arkansas, Louisiana, Mexico and Texas, except will not apply to lower Mississippi Valley points as named in A. D. Hall's Reshipping Tariff No. 2, I. C. C. No. A-9 (Mo. Pac. Tariff No. 243-A), and Mo. Pac. Tariff No. 1027-B (I. C. C. No. A-1235), Supplements thereto or re-issues thereof.

Item No. 5.

No allowance will be made on Grain or Seed which has been converted into products thereof.

314 No Supplements to this Tariff will be issued except for the purpose of cancelling the Tariff.
I. C. C. No. A-3327.
Cancels I. C. C. No. A-3248.
(File No. 190-1.)

Missouri, Kansas & Texas Railway Co.

In Connection with the Missouri, Kansas & Texas Ry. Co. of Tex. (FX-4, No. 118).

Freight Tariff.

M., K. & T. No. 4202-B.
Cancels No. 4202-A.
M., K. & T. of Tex. No. 4202-B.
Cancels No. 4202-A.

Naming Elevation Allowance on Grain, Carloads, at St. Louis, Mo., and East St. Louis, Ills.

Issued November 4, 1909. Effective November 7, 1909.

J. W. ALLEN,
G. F. A. M., K. & T. Ry. Co. of Texas, Dallas, Tex.
J. L. WEST,
A. G. F. A. M., K. & T. Ry. Co., St. Louis, Mo.
W. W. MILLER,
A. G. F. A. M., K. & T. Ry. Co., St. Louis, Mo.
R. W. HOCKADAY,
G. F. A. M., K. & T. Ry. in Kansas, Parsons, Kans.
E. S. BRIGGS,
A. G. F. A. M., K. & T. Ry. Co. of Tex., Houston, Tex.

Issued by

W. B. GROSECLOSE,
G. F. A. M., K. & T. Ry. Co., St. Louis, Mo.

Mailed I. C. C. November 4, 1909.

Allowance for Elevation.

(*a*) On carload shipments of Grain forwarded from St. Louis, Mo., or East St. Louis, Ill., or elevators located within St. Louis or East St. Louis switching limits, an allowance of three-fourths (¾) cents per one hundred pounds will be made by the M., K. & T. Ry. System for elevation (subject to requirements specified herein)
315 when destined points in Texas and Mexico, also the following points in Oklahoma, viz:

Ada, Okla.	Jennings, Okla.	Panama, Okla.
Bartlesville, Okla.	Krebs, Okla.	Prue, Okla.
Bokoshe, Okla.	Kiowa, Okla.	Reynolds, Okla.
Crowder, Okla.	Luther, Okla.	Shawnee, Okla.
Cushing, Okla.	Lehigh, Okla.	Stonewall, Okla.
Coalgate, Okla.	Muskogee, Okla.	Sparks, Okla.
Coretta, Okla.	McAlester, Okla.	Tulsa, Okla.
Dale, Okla.	Meridian, Okla.	Tueplo, Okla.
Dewey, Okla.	Midway, Okla.	Verdark, Okla.
Durant, Okla.	Navina, Okla.	Vinita, Okla.
Dustin, Okla.	Nelagony, Okla.	Wagoner, Okla.
El Reno, Okla.	Norfolk, Okla.	Wilburton, Okla.
Fallis, Okla.	Oklahoma City, Okla.	Weleetka Junction, Okla.
Guthrie, Okla.	Polson, Okla.	Warwick, Okla.
Henryetta, Okla.	Phillips, Okla.	Yale, Okla.

Requirements, Supervision and Check.

(*b*) No payment will be made where a similar allowance has been made on same Grain by some other line.

All payments under the above will be made only after check and verification by Chief Inspector Paul R. Rainer, Chicago, Ill., or District Inspector J. M. Ritchey, St. Louis, Mo.

Definition of Term "Elevation."

(*c*) In order to more clearly define the practice of the M., K. & T. Ry. System with respect to making allowances for elevation the term "Elevation" is understood to mean unloading of Grain from cars into an elevator and loading same out again into cars and such other service as may be performed for the amount shown in paragraph *"a."*

316 Afterwards, to-wit, on the 3rd day of March, 1910, the same being a day of the regular November, 1909, term of said court, the following decree was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405. In Equity.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Decree.

This cause was heard on the 24th day of January, A. D. 1910, before Walter H. Sanborn, William C. Hook and Elmer B. Adams, Judges of the said Circuit Court, and was then submitted to the Court for final determination and decree and thereupon, upon consideration thereof,

It is hereby Ordered, Adjudged and Decreed, that the order made by the defendant, the Interstate Commerce Commission, on June 29, 1908, to the effect that the Union Pacific Railroad Company is required to cease and desist for the period of two years from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs, or on grain so received in any of said elevators in which they have any direct or indirect ownership or interest, that is not re-shipped out of said elevators within ten (10) days after
317 it has been received therein and to cease and desist from paying any allowance to Peavey & Company on grain belonging to them or in which they have any direct or indirect ownership or interest that has been mixed, treated, weighed or inspected in any of their said elevators at Kansas City and Council Bluffs, be, and the same is hereby, set aside, suspended and annulled, and that the enforcement thereof be, and the same is hereby, perpetually restrained and enjoined.

It is further ordered, adjudged and decreed, that the Interstate Commerce Commission, its members and their agents, servants and representatives be, and they are, and each of them is hereby, perpetually enjoined from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement thereof, and that the complainants recover from the above named defendant their costs herein expended, taxed at $—.

It is further ordered, adjudged and decreed, that the complainants recover of and from the Union Pacific Railroad Company, on account of elevation services rendered by them between December 17, 1906 and October 1908, when the bill in this case was filed, $8332.50/100.

It is further ordered, adjudged and decreed, that the amount of

the costs may be taxed by the Clerk of the Court and upon her certificate of the amount thereof filed herein that amount may be inserted in the decree herein, and that the amount of the recovery of the Union Pacific Railroad Company pursuant to the opinion may be inserted in the decree by the Clerk upon the presentation to her of an agreement upon said amount by the attorneys for the complainants and for the Union Pacific Company, or upon the order of any one of the Circuit Judges, and that these entries shall be made then for now and shall have the same effect as though they had been entered in the decree before it was filed and enterd.

(Signed) WALTER H. SANBORN,
(Signed) WILLIAM C. HOOK,
(Signed) ELMER B. ADAMS,
Circuit Judges.

318 Afterwards, to-wit, on the 1st day of April, 1910, an assignment of errors was filed.

Said assignment of errors is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Assignment of Errors.

Now on this 1st day of April, 1910, comes the defendant, Union Pacific Railroad Company, and says that there is manifest error in the record, proceedings and decree in said cause, and that the decree is erroneous and against the just rights of the said defendant for the following reasons, and assigns for error:

I.

That the Court erred in finding, upon the issues joined, in favor of the complainants.

II.

That the Court erred in not finding, upon the issues joined in favor of the defendants.

III.

That the Court erred in setting aside, suspending and annulling the order made by the Interstate Commerce Commission on June

29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist, for a period of two years,
319 from paying any allowance to Peavey & Company, on their own grain received into any of their elevators at Kansas City and Council Bluffs, or on grain so received in any of the said elevators in which they have any direct or indirect ownership or interest, that is not reshipped out of said elevators within ten days after it is received therein.

IV.

That the Court erred in setting aside, suspending and annulling the order made by the Interstate Commerce Commission on June 29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist, for a period of two years, from paying any allowance to Peavey & Company on their own grain, or on grain in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed or inspected in any of their said elevators at Kansas City and Council Bluffs.

V.

That the Court erred in perpetually restraining and enjoining the enforcement of the order made by the Interstate Commerce Commission on June 29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist, for the period of two years, from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs, or on grain so received in any of said elevators in which they have any direct or indirect ownership or interest, that is not reshipped out of said elevators within ten days after it is received therein.

VI.

That the Court erred in perpetually restraining and enjoining the enforcement of the order made by the Interstate Commerce Commission on June 29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist, for a period of two years from paying any allowance to Peavey & Company on their own grain, or on grain in which they have any direct
320 or indirect ownership or interest, that has been mixed treated, weighed or inspected in any of their said elevators at Kansas City and Council Bluffs.

VII.

That the Court erred in perpetually enjoining the defendant, The Interstate Commerce Commission, its members and agents, servants and representatives, from enforcing or instituting any proceedings for the enforcement of the order made by the Interstate Commerce Commission on June 29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist for the period of two years, from paying any allowance to Peavey

& Company on their own grain received into any of their elevators at Kansas City and Council Bluffs, or on grain so received at any of said elevators, in which they have any direct or indirect ownership or interest, that is not reshipped out of said elevators within ten days after it is received therein.

VIII.

That the Court erred in perpetually enjoining the defendant, the Interstate Commerce Commission, its members and agents servants and representatives, from enforcing or instituting any proceedings for the enforcement of the order made by the Interstate Commerce Commission on June 29, 1908, to the effect that the Union Pacific Railroad Company be required to cease and desist, for a period of two years, from paying any allowance to Peavey & Company on their own grain, or on grain in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed or inspected in any of their said elevators at Kansas City and Council Bluffs.

IX.

That the Court erred in rendering judgment against the Union Pacific Railroad Company for the sum of $8332.50, on account of elevation services rendered by Peavey & Company to said Union Pacific Railroad Company between December 17, 1906, and October, 1908.

321 X.

The Court erred in ruling that the services performed in connection with the elevation of property transported are transportation.

XI.

The Court erred in ruling that it was beyond the power of the Commission to prohibit the allowance or payment to the owners or operators of elevators of reasonable compensation for elevation because the carrier's rate, together with that payment or allowance, was discriminatory.

XII.

The Court erred in ruling that reasonable compensation for elevation services includes not only the cost of the services, but reasonable reward therefor in addition.

XIII.

The Court erred in ruling that the facts disclosed by the record did not constitute a violation of Section 2 of the Act to Regulate Commerce.

XIV.

The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of Section 3 of the Act to regulate Commerce.

Wherefore, defendant prays that the decree of said Circuit Court be reversed.

R. W. BLAIR,
N. H. LOOMIS,
F. C. DILLARD,
EDSON RICH,
Attorneys for Defendant Union Pacific Railroad Company.

322 Afterwards, to wit, on the 1st day of April, 1910, a Petition for Appeal of the defendant Union Pacific Railroad Company and an Order allowing same were filed and entered of record. Said Petition and Order are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, JAMES S. HARLAN, and EDGAR E. CLARK, Members Composing the Interstate Commerce Commission, Defendants.

Petition for Appeal to the Supreme Court of the United States.

The above named defendant, Union Pacific Railroad Company, conceiving itself aggrieved by the decree made and entered on the 3rd day of March, 1910, in the above entitled cause, does hereby appeal from the said order and decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

R. W. BLAIR,
N. H. LOOMIS,
F. C. DILLARD,
EDSON RICH,
Attorneys for Union Pacific Railroad Company.

Dated this 1st day of April, 1910.

The foregoing petition and claim for Appeal is hereby allowed this 1st day of April, 1910. A bond for $10,000 shall operate as a supersedeas.

(Signed) WILLIAM C. HOOK,
Circuit Judge.

323 Afterwards, to-wit, on the 1st day of April, 1910, a petition for Appeal and assignment of errors of Interstate Commerce Commission were filed.

Said petition for appeal and assignment of errors are in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis ——, —— S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Petition for Appeal.

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, by its solicitors, Arba S. Van Valkenburgh and P. J. Farrell, represents that in the decree or order of said Circuit Court in said cause, rendered on the 3rd day of March, 1910, there is manifest error, to its injury, and therefore prays for an order granting an appeal from said decree to the Supreme Court of the United States.

A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

324 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Assignments of Error.

And now, on the 1st day of April, 1910, comes one of the above named defendants Interstate Commerce Commission by its solicitors and says that the decree in the above entitled cause is erroneous and against the just rights of said defendant for the following reasons:

1. The Circuit Court erred in not dismissing the bill for want of jurisdiction.

2. The Circuit Court erred in not dismissing the bill for want of equity.

3. The Circuit Court erred in ruling that the Commission has no power to require a carrier to cease and desist from paying to a party interested in grain an allowance for services rendered in connection with the transfer thereof from car to car through an elevator where the grain is cleaned, clipped, mixed or otherwise treated while being so transferred.

4. The Circuit Court erred in ruling that where a carrier transports in one of its own cars traffic destined to a point beyond the terminus of its own line of railway it has a right to insist that at such terminus the traffic shall be unloaded and the car released.

325 5. The Circuit Court erred in ruling that all services performed in connection with the elevation of property transported are transportation.

6. The Circuit Court erred in ruling that the discrimination disclosed by the record is authorized by law.

7. The Circuit Court erred in ruling that a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform said services, and regardless of discriminations which may result from such advantages.

8. The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 2 of the Act to regulate commerce.

9. The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 3 of said Act.

10. The Circuit Court erred in entering a decree annulling and enjoining enforcement of the order of the Commission.

For all of which reasons the decree and holding of the Circuit Court in such regard should be reversed.

P. J. FARRELL,
Solicitors for the Interstate Commerce Commission.

326 Afterwards, to wit, on the 1st day of April, 1910, an Order allowing appeal was filed and entered of record. Said order is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Order Allowing Appeal.

In this cause, the Interstate Commerce Commission, one of the defendants, by its solicitors, Arba S. Van Valkenburgh and P. J. Farrell, having made its application in writing for an appeal from the decree therein, rendered on the 3rd day of March, 1910, to the Supreme Court of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of $2,000 exclusive of costs, it is therefore ordered that said appeal be and the same is hereby granted and returnable on the 1st day of April, 1910.

(Signed) WILLIAM C. HOOK, *Judge.*

327 Afterwards, to-wit, on the 1st day of April, 1910, a bond for appeal was approved and filed.

Said bond for appeal is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3405.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, Members Composing the Interstate Commerce Commission, Defendants.

Supersedeas Bond.

Know all men by these Presents that we, Union Pacific Railroad Company, as principal, and H. G. Kaill, as surety, are held and firmly bound unto F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, in the full and just sum of Ten Thousand Dollars, ($10,000.00), to be paid to the said F. H. Peavey & Company, Omaha Elevator Company and Midland Ele-

vator Company their executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of April, A. D. 1910.

Whereas, lately at the December, 1909, Term of the Cir-
328 cuit Court of the United States for the Western Division of the Western District of Missouri, in a suit depending in the said court between F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, Complainants, and Union Pacific Railroad Company and Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan and Edgar E. Clark, Members composing the Interstate Commerce Commission, Defendants, a decree was rendered against the said defendants, the said decree providing, among other things, for the payment by Union Pacific Railroad Company of certain sums of money to the complainants, and the said defendant, Union Pacific Railroad Company, has obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the clerk of said court, to reverse the decree in the aforesaid suit, and a citation directed to the said complainants, F. H. Peavey & Company, Omaha Elevator Company and Midland Elevator Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., thirty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said defendant, Union Pacific Railroad Company, shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and authority.

UNION PACIFIC RAILROAD COMPANY,
Principal.

By R. W. BLAIR, *Its Attorneys.*
H. G. KAILL, *Surety.*

Sealed and delivered in presence of
C. H. BUCHER.

Approved by
WILLIAM C. HOOK,
Circuit Judge.

329 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405. In Equity.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and MIDLAND ELEVATOR COMPANY, Complainants,

vs.

UNION PACIFIC RAILROAD COMPANY and MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, JAMES S. HARLAN, and EDGAR E. CLARK, Members Composing the Interstate Commerce Commission, Defendants.

No. 3437. In Equity.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and CHARLES W. LONSDALE, as Officers and Members of the Board of Trade of Kansas City; Omaha Grain Exchange, a Corporation; St. Joseph Board of Trade, a Corporation, and WILLIAM S. WASHER, EDWIN LUKINS, and SAMUEL E. HARBURGER, as Officers and Members of the Atchison Board of Trade, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant; CHICAGO & ALTON Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, Interveners.

Mr. Frank Hagerman, argued the case for Peavey & Company and the complainants in both suits. Mr. M. B. Koon, Mr. George T. Bell and Mr. John Barton Payne, appeared with him on the briefs.

Mr. Arba S. Van Valkenburgh and Mr. P. J. Farrell, argued the case for the Interstate Commerce Commission.

Mr. F. C. Dillard and Mr. Edson Rich, argued the case for the Union Pacific Railroad Company. Mr. N. H. Loomis and Mr. R. W. Blair, were with them on the briefs.

Mr. Frank Hagerman and Mr. John Barton Payne, argued the case for the Intervenors.

Before Sanborn, Hook, and Adams, Circuit Judges.

330 Syllabus.

1. Interstate Commerce Act—Parties to suits to avoid orders of Commission not necessarily parties to proceedings before Commission.

Parties injuriously affected by the orders of the Interstate Commerce Commission may lawfully institute suits in the Circuit Courts, to enjoin, suspend or annul such orders although they were not parties to the proceeding before the Commission on which the orders are based.

Parties similarly situated may intervene in such suits.

2. Interstate Commerce Commission—Jurisdiction of Courts to Relieve from its Orders.

The wisdom or expediency of the lawful discharge of the admisnistrative duties of the Interstate Commerce Commission is not reviewable by the courts.

But the courts may relieve from orders of the Commission which deprive complainants of their property without due process of law, or take it without just compensation, from those which are beyond the delegated power of the Commission and from those which evidence so unreasonable an exercise of its power as to be substantially without though formally within it.

3. Same—Orders prohibiting payment or allowance for elevation and transfer in transit beyond the power of the Commission.

Orders of the Commission which prohibit the allowance or payment by carriers of all compensation to owners and operators of elevators for elevation and transfer in transit, are beyond the delegated power of the Commission.

An order which forbids a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain which he ships unless he refuses to clean, clip, mix, inspect, or grade the grain while it is passing through the elevator is beyond the power of the Commission.

331 SANBORN, *Circuit Judge:*

Has the Interstate Commerce Commission the power to prohibit railroad companies from paying to the owners and lessees of elevators all compensation for the elevation of grain in transit?

Until June 29, 1908, repeated decisions of the Commission and the practice of carriers and shippers had been consonant with a negative answer to this question. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co. (June 25, 1904) 10 I. C. C. R. 309, 324, 325, 326; Re Hearing on Petition of Chicago Great Western Ry. Co. and others, (April 9, 1907) 12 I. C. C. R. 85, 89; City Council of Atchison v. Missouri Pacific Railway Co., (April 29, 1907) 12 I. C. C. R. 112, 114; Consolidated Forwarding Company v. Southern Pacific Company, (April 19, 1902) 9 I. C. C. R. 182, 206*e*. American National Livestock Assn. & Cattle Raising Assn. of Texas v. Texas Pacific Ry. Co., (March 7, 1907) 12 I. C. C. R. 32, 36; Central Yellow Pine Assn. v. Vicksburg, Shreveport & Pacific Ry. Co., (March 19, 1904) 10 I. C. C. R. 193, 211, 213; In the Matter of Unlawful Rates and Practices in the Transportation of Cotton by the Kansas City, Memphis & Birmingham R. R. Co. 8 I. C. C. R. 121, 136, 139, 140; Merchants Cotton Press & Storage Co. v. Interstate Commerce Commission, (June 24, 1909) 17 I. C. C. R. 78, 99, 101, 103, 105; Kentucky Railroad Commission v. L. & N. R. R. Co., 10 I. C. C. R. 173.

On June 29, 1908, the Commission *the* an affirmative answer to the question before us and issued orders which in terms forbade the Chicago, Burlington & Quincy R. R. Co., the Missouri Pacific Ry. Co., the St. Louis & San Francisco R. R. Co., the Chicago, Rock

Island & Pacific R. R. Co. and the Missouri, Kansas & Texas Railroad Company, and in effect forbade the Union Pacific R. R. Co., to pay or allow to the owners or lessees of elevators at Omaha, Kansas City, and other cities on the Missouri River, any compensation whatever for the elevation of grain in transit at those points and
332 on October 16, 1908, announced that the principle of the decision upon which these orders are based applies everywhere and that the Commission expects that it will be universally accepted by carriers throughout the nation. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., 14 I. C. C. R. 315; Traffic Bureau Merchants Exchange of St. Louis v. Chicago, Burlington & Quincy R. R. Co., 14 I. C. C. R. 317, 331, 510.

Mindful of the fact that this ruling and these orders were subversive of former decisions and of an approved course of business thereunder in reliance upon which hundreds of thousands of dollars had been invested in elevators and facilities for the transfer of grain, that great grain markets had been established near the producers upon the Missouri River at the termini of railroad systems, and that the parties in interest desired a review of the legal issue presented, the Commission postponed the effective date of the orders until the suits in hand could be brought to final hearing.

It may not be unprofitable before entering upon the discussion of the question at issue to call to mind a few general propositions of law, the general situation of the parties, the business and the transportation out of which this issue arises.

Every railroad company has the right to insist that its cars shall be unloaded at the termini of its railroad and that their contents destined to points beyond shall be loaded into cars or other vehicles of the connecting carriers. Elevation and weighing in the elevator are indispensable means of the transfer of grain from the cars of one carriers to those of another under the existing conditions and methods of transportation through our large cities. There is neither time nor space nor labor for the shovel or any other method of transfer, or for weighing in the car or any other method of weighing.
The operators of elevators weigh and certify to the weight of
333 grain as it passes through their elevators or it is weighed in the elevators and its weight is certified by some official of the State or of some grain exchange or other association, and these certificates are accepted as conclusive evidence by carriers, shippers and dealers alike. Elevation consists of the unloading of grain from cars or vessels into elevators and the loading of the grain out again into cars or into other vehicles. As elevation is indispensable to weighing in the elevator, if the prohibition of compensation for elevation in transit shall prevent the elevation of the grain at the Missouri River it will also prevent the weighing there so that the inhibition at issue at these cases really involves transportation services both in elevation and in weighing in transit.

"All services in connection with the * * * elevation * * * of the property transported" are transportation. Act of June 29, 1906, to amend Interstate Commerce Act, Statutes at Large, pages 584,, 586, Secs. 1 and 2. Railroad companies are required to fur-

nish these services upon request, Sec. 1; to state separately in their schedules their charges therefor, (Sec. 6 as amended, page 586) and if such services are rendered by the owner of the property transported the charge and allowance therefor may not be more than is just and reasonable, (Sec. 15 as amended, page 590). The allowance for the elevation of grain here in question was three-fourths of a cent per hundred pounds, it was separately stated in the schedules of the carriers and was allowed only upon grain received into the elevators from cars coming from the west which was shipped out of the elevators into cars bound east, north and south. The same services in elevation were offered to all shippers and the same allowance was made to all operators of elevators whether they were or were not the owners of the grain transported.

More than 90% nearly all of the grain brought to the Missouri River, passes on to destinations east, north and south. This grain takes the local rate from points west of the Missouri River to the River and from the Missouri River to the Mississippi River and to points beyond it takes the proportional rate which is less
334 than the local rate upon a certificate that it has come from points west of the Missouri River.

In 1907, 209,728,650 bushels of grain were handled in and out of Omaha, Kansas City, Atchison and St. Joseph. Since January 1, 1904, more than three million dollars have been invested in elevators in those cities for the purpose of handling this grain.

The Union Pacific R. R. Co. has railroads extending into and through the grain fields of Kansas and Nebraska, and its eastern termini are at Kansas City and Council Bluffs, which for the purpose of this opinion is included in the general term "Omaha." The greater volume of the grain moves from the fields in Kansas and Nebraska each year to the Missouri River in a few months in the autumn and winter. The portion of that grain which a railroad company can haul depends upon the number of box cars it can use for this purpose during this small portion of the year. The Union Pacific Company has the short haul. It is in competition with companies that have railroads from these grain fields through Missouri River points to and beyond the Mississippi River. They can carry this grain profitably on their own cars and rails east as well as west of the Missouri River without elevation, but it is requisite to the profitable use by the Union Pacific Company of its equipment that the grain be elevated out of its cars at the Missouri River and that the cars be sent back west for new loads promptly. If it permits these cars to pass on east over connect-lines they will be absent when their use upon its railroads is most needed and is most profitable, it will lose a large share of the traffic in this grain and of the revenue which it could earn by the use of its cars upon its own tracks. Thus the elevation of the grain at Omaha and Kansas City is necessary to the reasonable competition and participation of the Union Pacific Company in this transportation.

The Chicago Great Western Railroad Company and other com-

panies, whose western termini are at Missouri River points, are
335 in a like situation. The elevation of the grain at those cities is equally indispensable to their participation in this traffic. They can get no grain into their cars at Omaha and Kansas City unless it is first taken out of the cars which bring it from the west to the river.

On the other hand, carriers that have railroads from the grain fields of Nebraska and Kansas through the Missouri River cities to the north, east and south are interested to prevent elevation at the River, because the companies whose railroads terminate there cannot compete with them successfully in the absence of this facile means of transfer of the grain from the cars of the company west of the river to those of the company east of it.

But perhaps the parties most deeply interested in the issue before us are the owners, lessees and operators of the elevators at the Missouri River cities and at all other cities in the nation where great terminal elevators have been constructed. For years carriers have used these elevators and have paid their owners and lessees for the transfer of the grain through them and the latter have invested large amounts of money in the construction of these buildings and in the establishment of markets near the grain fields that may be seriously affected if this practice is declared to be unlawful and is henceforth prohibited.

In 1899, the Union Pacific Company mindful of the necessity of unloading its cars of grain at the eastern termini of its roads and of promptly returning them westerly for new loads, requested Mr. Frank H. Peavey to construct and operate an elevator for this purpose at Council Bluffs. He consented and made a contract with the Company to build and operate an elevator with a capacity of 1,000,000 bushels, and to unload, store for 48 hours and reload grain to the capacity of his elevator for the Union Pacific Company, and that Company contracted to pay him not exceeding one and one-fourth cents per hundred pounds for the first ten years and one cent per hundred pounds for the second ten years for this
336 service. He built an elevator of the capacity specified in the year 1899, at an expense of $200,000.00, in reliance upon this contract and this elevator has ever since been operated thereunder by reason of this agreement. Mr. Peavey assigned his contract to the complainant, Omaha Elevator Company, a corporation, and an average of over 600,000,000 bushels of grain passes through the elevator annually. Another elevator now owned and operated by the complainant, The Midland Elevator Company, through which an average of more than 2,500,000 bushels of grain passes annually was built and is operated at Kansas City, under a like contract. The complainant, F. H. Peavey & Company, is a corporation. It owns nearly all the stock of the two elevator companies and henceforth the contracts, the elevators and their rights and interests will be treated as those of Peavey & Company. Peavey & Company owns many country elevators on the railroads of the Union Pacific Company and is a purchaser and shipper of most of the grain which passes through its terminal elevators.

On June 25, 1904, after an investigation of these contracts and

of the practice of the Union Pacific Company to allow Peavey & Company one and one-fourth cents per hundred pounds for the elevation of its own grain, as well as that of others, and after consideration of the contentions then made that this allowance gave it opportunities to violate the prohibition of rebates, (10 I. C. C. R. 320) that it secured thereby the commercial advantages of treating the grain, that is of cleaning, clipping, inspecting, mixing and grading it during its elevation which shippers who had no terminal elevators did not receive, (325) the Commission held that the contracts were made in good faith, that the allowance was reasonable and that no requirement of the law had been disregarded in their making or their performance (321, 326).

On April 9, 1907, after a rehearing on the petition of the Chicago Great Western Railway Company and others, the Commission held that an allowance to the owner of an elevator of more than the cost of elevation for the service of elevating his own grain
337 wrought a preference and a rebate, that three-fourths of a cent per hundred pounds was not in excess of the cost of elevation and would return no profit to Peavey & Company, and it ordered the allowance made to it by the Union Pacific Company reduced to that amount (12 I. C. C. R. 85). In all other respects the Commission adhered to and re-affirmed its former ruling. It held that elevation is a facility which a carrier may provide for the benefit of shippers if it finds it to its interest so to do, that this facility must be open to all on equal and reasonable terms, that a railroad company may construct elevators itself or make an arrangement with the owner of an elevator to furnish elevation facilities, (87) and that the Commission has no power under the Acts of Congress to forbid a railroad company from contracting with an owner of an elevator, who is also a shipper, for such facilities, but that its authority extends to such regulation and control of the relations between them as will protect the rights of others and enforce the observance of the law (89).

The Union Pacific Company in 1906, extended to all elevators at Omaha and Kansas City the allowance it made to Peavey & Company. Its official published schedules have provided since June 27, 1906, that "to expedite the movement and to secure the prompt release and return of equipment an allowance of (1¼ cents prior to June 1, 1907, and ¾ of a cent since that date) per hundred pounds will be made by the Union Pacific Company to the elevators performing the service on grain in carloads transferred by the elevators at South Omaha, Omaha, Council Bluffs and Kansas City, subject to the following conditions" (1) all grain must originate west of these cities upon the railroads of and be transported to these cities by the Union Pacific Company (2) the allowance will be made on grain which moves to points beyond Council Bluffs or Kansas City only (3) no allowance will be made when more than 48 hours elapse between the time of delivery of loads by the Union Pacific Company to the elevator or connecting lines and the release and return of the empty cars to the Union Pacific Railroad.
338 It will be noticed that the schedules and practice of the Company offered this allowance to all elevators at the eastern

termini, and this elevation to all shippers whose grain went beyond its termini for the same rate of compensation whether they were owners of elevators or not, and that it made this offer to induce the prompt return of its cars to the western grain fields.

On June 29, 1908, upon a second rehearing, the Commission held that any allowance to Peavey & Company for the elevation of the grain which it shipped through its terminal elevators was an undue preference and therefore unlawful, because by the use of these elevators it secured at the same time with the elevation the commercial advantages of cleaning, clipping, inspecting, mixing and grading the grain, which were no part of transportation, (14 I. C. C. R. 315, 316). It accordingly ordered that the Union Pacific Company cease "from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs." Under this order it will be seen that Peavey & Company may collect the allowance for the elevation of its grain from the Union Pacific Company on condition that it uses its terminal elevators for the purpose of elevating this grain alone. It may treat its grain at other elevators, then ship it through Omaha and Kansas City, elevate it there and receive the allowance for elevation on condition that it does not again treat it there. Peavey & Company and its Elevator Companies have continued to elevate the grain which they shipped through the termini of the Union Pacific Company and to return the empty cars in accordance with their contracts and the schedules of the Union Pacific Company, but the latter corporation has refused to allow or to pay them anything for these services which have been rendered since the last order of the
339 Commission, and the complainants have brought and prosecuted their suit to enjoin the enforcement of this order and to recover of the Union Pacific Company compensation for this elevation.

Late in the year 1907, the Traffic Bureau, a department of the Merchants' Exchange of St. Louis, an association operating under the Laws of Missouri, to promote the commercial interests of that City, filed petitions against Chicago, Burlington & Quincy Railroad Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company and Missouri, Kansas & Texas Railway Company, corporations which own through lines of railroad from the grain fields of Kansas and Nebraska to points east of the Missouri River and which were interested to prevent elevation of grain at Missouri River points but were making the same allowance for elevation there that were made by the Union Pacific Company in order to meet the latter's competition, and prayed that the Commission would abolish this allowance for elevation and on June 29, 1908, the same day that it made the order in the case of the Union Pacific Company, the Commission ordered these Railroad Companies to abstain "from giving or paying three-fourths of a cent per hundred pounds, or any other sum, as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points." (14 I. C. C. R. 317, 331.)

Parties who represented the complainants in the second case under consideration applied to the Commission to grant them a hearing, but this was denied them, and the Commission said: "A cardinal consideration in our conclusion was the belief that in no way could discrimination and preference be prevented except by a complete prohibition of these payments and privileges. The principle of our decision applies everywhere. We expect that the decision will be universally accepted." (14 I. C. C. R. 510). The Interstate Commerce Act authorizes incorporated boards of trade of cities and associations of like character to apply to the Commission for
340 for relief, 24 Stat. 383, Sec. 13, and such corporations and members representing such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the Commission.

Thereupon Harry J. Diffenbaugh, Edmund D. Bigelow and Charles W. Lonsdale, the President, Secretary and Chairman, respectively, of the Transportation Committee of, and who were authorized to represent the, Board of Trade of Kansas City, which is an association of 200 members consisting of operators of grain elevators, millers and dealers in grain who handled a total of 11,334,050 bushels of grain of the value of $70,739,930.00 in the year 1907, the Omaha Grain Exchange, a corporation whose members are engaged in the same business and interested in this order in the same way at Omaha, the St. Joseph Board of Trade, a corporation, and certain individuals representing the Atchison Board of Trade, exhibited their bill against the Commission wherein they set forth the material facts which have been recited, alleged that this order of the Commission was violative of the Constitution, beyond the powers of the Commission and that its enforcement would depreciate the value of their elevators and their investments in these and other facilities for the transfer, purchase and sale of grain in their cities by depriving them of compensation for its transfer, would draw away from their cities to eastern, northern and southern marts a large volume of their grain business and would tend to diminish the grain markets in their cities to their irreparable injury, and prayed for equitable relief. The Commission demurred to this bill and the argument on the demurrer was submitted at the final hearing of these cases.

At this final hearing a motion was made by the Chicago, Milwaukee & St. Paul Railway Company, the Wabash Railroad Company, the Chicago Great Western Railroad Company and the Chi-
cago & Alton Railroad Company for leave to file intervening
341 petitions in this Diffenbaugh case, and this motion was submitted for decision. The petitions of these companies show that they own railroads whose western termini are at the Missouri River cities, that if they are denied the right to provide for the transfer and weighing of grain by making compensation therefor to the operators of elevators at these cities their railroad terminals and the elevators there, some of which are owned by one of these companies, will be greatly depreciated in value, the shippers and producers of grain on lines of railway which have their eastern termini at the Missouri River cities, in the shipment of their grain to points

east, north and south of that River, will be compelled to pay large sums of money for transferring and weighing their grain at the river while producers and shippers of grain located on lines of railroad extending through those cities to the east, north and south will incur no such expense and will thus secure an undue preference, that the volume of grain which under the present allowance passes over the petitioners' lines of railroad will be diverted from their railroads to the through lines and from the markets at the Missouri River cities to eastern, northern and southern cities, and that a similar depreciation of the values of terminal and elevator property and business and like diversion of grain and the traffic therein from established grain markets in the region between the Allegheny mountains and the Missouri River will be effected if the prohibitive order of the Commission is put into operation throughout the nation, and they ask that the prayer of the complainants in the Diffenbaugh case be granted.

The demurrer to the bill of Diffenbaugh and his associates presents two objections, that the complainants were not parties to the proceeding before the Commission upon which the order challenged is based, and that there is no equity in the bill. But this is a controversy between competitors in transportation and in trade, between the Traffic Bureau of St. Louis and the owners of the lines
342 of railroad which extend from the grain fields of Kansas and Nebraska through the Missouri River cities upon one side and the Boards of Trade, the owners of elevators and dealers of grain in the Missouri River cities and the Railroad Companies whose termini are at those cities on the other. The former are interested in opposition to the transfer of grain at those cities and to any allowance therefor, the latter are interested to promote the transfer of grain in those cities and to secure an allowance therefor. One of the parties opposed to this transfer upon notice to other parties who are equally opposed to it and without any notice to any party in favor of it has procured this final order of the Commission which prohibits the Railroad Companies from making any allowance for the elevation, necessarily deterioriates the value of the property, diminishes the volume and the profit of the business, strikes down profitable contracts and destroys the right of parties in favor of the transfer to make such contracts. These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing before the Commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest, parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order because none of their interests are irreparably or at all injured, and if those whose interests are injuriously affected may not assail it, the order is impregnable. This cannot be the true rule of right or of practice. A careful search of the Interstate Commerce Act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul or suspend an

order of the Commission to those who were parties to the pro-
343 ceeding before it upon which the order was based. The proceeding in the court is not an appeal, it is a plenary suit in equity. "The jurisdiction to hear and determine such suits" is vested in the Circuit Courts. Sec. 16, as amended, 34 Stat. 592. The determination of the question what parties may maintain such suits is left by the Interstate Commerce Act to the general rules and practice in equity and under them any party whose rights of property are in danger of an irreparable injury from an unauthorized order of the Commission may appeal to a federal court of equity for relief. Such an order issued without notice to the parties injuriously affected and without opportunity to them to present meritorious defenses is not more conclusive than a judgment of a court, and Chief Justice Marshall declared in Marine Insurance Company v. Hodgson, 7 Cranch 332, 336, that: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." Hendrickson v. Hinckley, 17 How. 442, 444; Hungerford v. Sigerson, 20 How. 156, 161; Gaines v. Fuentes, 92 U. S. 10, 22; Barrow v. Hunton, 99 U. S. 80, 85; Johnson v. Waters, 111 U. S. 640, 667; Arrowsmith v. Gleason, 129 U. S. 86, 97, 98; Marshall v. Holmes, 141 U. S. 589, 596; National Surety Company v. State Bank, 120 Fed. 593, 598, 56 C. C. A. 657, 672. The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this court, the allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business present good ground for equitable relief and the demurrer of the Commission must be overruled. For the same reasons the petitions of the Railroad Companies that seek to intervene present substantial equities and their
344 motion for leave to file them and to become parties to this suit must be granted.

The Interstate Commerce Commission is an administrative tribunal and the wisdom and expediency of the lawful exercise of the discretion delegated to it under the Constitution and the statutes is not reviewable by the courts. But the power is vested in and the duty is imposed upon the Circuit Courts to relieve from orders of the Commission which deprive complainants of their property without due process of law or take it without just compensation in violation of the fifth amendment to the Constitution, from orders which are beyond the limits of the power delegated by the Acts of Congress to the Commission and from orders which though in form within its delegated power evidence so unreasonable an exercise of it that they are in substance beyond it. Interstate Commerce Commission v. Illinois Central Railroad Company, Supreme Court, January 10, 1910; Stickney v. Interstate Commerce Commission, Supreme Court, Nov. 29, 1909, 164 Fed. 638, 644; Missouri, Kansas & Texas Ry. Co. v. Commission, 164 Fed. 645, 648.

Laying aside the question of the constitutionality of the orders

challenged in these cases, let us consider this question: Has the Commission been empowered to prohibit allowances and payments of compensation for the transfer by elevators of grain in transit? The statutes under which the Commission acts require the rates for transportation, and hence for the elevation of grain in transit, to be just and reasonable. Elevation is a part of transportation which the law requires the carriers to provide and for which it authorizes them to pay others reasonable compensation. The three-fourths of a cent per hundred pounds which the carriers now pay for this service at the Missouri River cities is a just and reasonable compensation for it. Whence comes the power of the Commission to forbid this payment? From the facts, says the Commission, that those who receive this compensation generally own the grain which they transfer and the elevators by means of which they transfer it, that they derive
345 pecuniary advantages which those who do not own the elevators and also the grain transferred do not secure by treating, that is, by cleaning, clipping, mixing and grading the grain as it passes through the elevators thereby enhancing its value, and that there is danger that they may use the practice of allowing this compensation to violate the Acts of Congress, to secure rebates and effect unjust discrimination. That although other considerations are mentioned in the opinions of some members of the Commission, the facts above stated are the only ones upon which the Commission relied to sustain their authority to make the orders in question, let its opinion upon the motion for another hearing, (14 I. C. C. R. 510) and the order in the case of the Union Pacific Company which permits it to make this allowance to Peavey & Company on condition that the latter separates its elevation or transfer in transit from its treatment of the grain, witness.

But the legal presumption is that parties will obey the law and discharge their duties. Reasonable compensation for transfer services may not be denied lawfully because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the Commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.

The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting and grading of it is a trade service, it is no part of transportation and is not a transportation service. No power has ever been granted to the Interstate Commerce Commission
346 to regulate, to prohibit, to separate by miles from the service of elevation and transfer in transit or from any other transportation service or to interfere with this trade service. The advantages derived from it are of the same nature as those which the owners of mills enjoy who manufacture into flour in transit the wheat which they own and ship, who saw into lumber in transit the

logs which they own and ship, and who dress in transit the rough lumber which they own and ship. They are of the same nature as those which the owners and shippers of cotton who practically own the compress derive from compressing the cotton in transit, and yet in all these cases the carriers maintain and the Commission sustains the same rates of transportation for the shippers who own the mills, the compresses, and the articles transported and the shippers who own none of these facilities of trade and derive none of the advantages thereof. See the authorities cited at the opening of this opinion. They are of the same nature as those which the owners of cars leased to a railroad company who are shippers of the articles transported therein may derive from that ownership. Consolidated Forwarding Co. v. Southern Railway Company, 9 I. C. C. R. 182, 206*e*.

It is no part of the duty, nor is it within the power of the Commission, to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than one who loads it from a wagon. Harp v. Choctaw, Oklahoma & Gulf R. Co., 125 Fed. 445. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership and not to the transportation of the articles shipped and the consideration and regulation of these advantages are without the scope of the Commission's power.

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The truth is that trade advantages of this nature do not condition the questions of reasonableness of rates, of rebates, or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills and by their use derives greater profit from the dealing in the articles which he ships over a railroad is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which he renders that the shipper who owns less or no such trade facilities and derives less profit is entitled to. The reasonableness of and the discrimination by the charge and the compensation is conditioned by the reasonable value of the service, not by the gain or the loss which the shipper derives from the use of the trading facilities he owns in the handling of the articles transported. The pecuniary advantages that result to the owners of elevators, who are also shippers of the grain, from its treatment in their elevators, are derived, not from the transportation of the grain nor from its elevation or transfer in transit through their elevators, but from their ownership of their operative control of the elevators, and their use of them in the conduct of their trade. They are therefore ultra vires the Commission and immaterial to the issues whether or not the compensation or allowance to the owners of elevators who are also shippers is reasonable, unjustly discriminatory or violative of the

prohibition against rebates, and when these advantages are laid aside this compensation or allowance is neither.

That the Commission is without power to prohibit carriers from paying or allowing to the owners of elevators reasonable compensation for elevating grain in transit which they own and ship is demonstrated by the course of decision and legislation that is crystallized in the amended Interstate Commerce Act. Prior to 1906, that act contained no declaration that elevation or transfer in transit
348 was a part of transportation or that compensation might be charged or allowed therefor. After the Commission had decided in 1904, that the allowance by the Union Pacific Company of one and one-fourth cents per hundred pounds to Peavey & Company for the elevation of the grain in transit, the larger portion of which Peavey & Company owned and shipped, and in the year 1905, the Commission made this report and recommendation to Congress:

"Terminal roads, elevator charges and private cars.

There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the Commission should be empowered in
349 a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altoghether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon the Congress amended Section 1 of the Act so that it provides that transportation shall include "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing and handling of property transported; and it shall be the duty of every carrier subject to the

provisions of this Act, to provide and furnish such transportation upon reasonable request therefor," 34 Stat. 584; Section 6, so that it provides that the schedules of rates required of the carriers shall "state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed," 34 Stat. 586; and Section 15, so that it provides "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." 34 Stat. 590.

The contract of the Union Pacific Company with Peavey & Company, the decision of the Commission thereon in 1904, and the report of the Commission in 1905, had informed the Congress, and when these amendments were enacted the members of Con-
350 gress were aware of the trade advantages which naturally and necessarily resulted to a shipper from the ownership of cars, elevators, industrial tracks, compresses and other facilities by which he transports his own property for a carrier and the danger of discrimination and of rebates from an "excessive division to a terminal road owned by a shipper, the payment of an excessive elevator charge to the owner of the grain and the payment of an excessive mileage upon the private car which conveys the property of the owner of the car," and in the light of all this knowledge it prescribed the remedy and fixed its limit. It is that the charge and allowance to the owner of the elevator, who is also the shipper of the grain, shall be no more than is just and reasonable and the limit of the power of the Commission is to determine what is a reasonable charge as the maximum to be paid by the carrier for the service. Counsel argue that this view ignores the power vested in the Commission to prevent rebates under Section 2, and to repress regulations and practices of carriers that are unjustly discriminatory or unduly preferential under Section 3 and Section 15 of the amended Act. But the permission granted by the Amendment of 1906, to continue the known regulation and practice of allowing reasonable compensation for elevation and transfer in transit to shippers who were also the owners of elevators and the clear limitation in that amendment of the power of the Commission to the determination of the reasonableness of the allowances thus made was, in view of the knowledge of the Congress and of the common knowledge of the pecuniary advantages derived by such shippers from this practice, a conclusive legislative determination that when the allowances were reasonable neither the fact that the shipper of the grain was the owner of the elevator nor the fact that he enhanced the value of his grain by treating it during the elevation and transfer in transit constituted a rebate, an unjust discrimination, an undue preference

or a repressible danger of either. It was not only a clear withholding from the Commission of the power, but an implied and
351 effective prohibition of the Commission to forbid the allowance to such shippers and owners of reasonable compensation for the elevation and transfer in transit of their grain through their elevators.

Again, the allowance here in question was not a rebate because it was not a concession from the published schedules, but an allowance in accordance with them. If it had been discriminatory it would have been because the entire rate of transportation charged by the carrier after this allowance was deducted would have been unduly preferential. But the allowance was only reasonable compensation for the service rendered and the lawful remedy, if such discrimination existed, could not have been to deprive the owner of the elevator of such compensation for the service of transportation it was rendering and thereby of a beneficial use and of a portion of the value of its elevator. In Interstate Commerce Commission v. Stickney, Supreme Court, November 29, 1909, 164 Fed. 638, 643, 644, the Supreme Court affirmed an injunction against an order of the Commission which reduced a reasonable terminal charge of $2.00 per car to $1.00 per car on the ground that the rate of the carrier plus the terminal charge was in its opinion unreasonably high, and held that the Commission's remedy was to reduce the carrier's rate and that it was beyond its power to reduce the terminal charge below reasonable compensation for the service. By the same mark it was beyond the power of the Commission to prohibit the allowance or payment to the owners and operators of elevators of reasonable compensation for elevation because the carriers' rate together with that payment or allowance was discriminatory. The result is that the orders in these cases were beyond the power of the Commission and that they cannot be sustained.

Counsel have presented arguments upon which the orders of the Commission and its announcement that the principle upon which they are founded will result in universal prohibition of payment to owners and operators of elevators throughout the land of any compensation for elevation obviously do not rest. But these
352 arguments have also been carefully considered.

It is said that the grain upon which the allowance is made is not elevated or transferred in transit because it is shipped from points of origin in Kansas and Nebraska to the Missouri River upon local rates and local way-bills. But a proportional rate is the balance of a through rate. There are proportional rates from the Missouri River to the Mississippi River and to points east, north and south which are less than the local rates between those points and this grain which comes from points west of the Missouri River takes, not the local, but these proportional rates, east of the river upon the certificates or expense bills of the companies west of the river which show whence it came. Ninety per cent of the grain which comes to the Missouri River points passes through them to points east, north and south. The schedules of the carriers and their practice limit this elevator allowance or payment to grain coming into the elevators from the west which is actually loaded out into cars

sent north, south or east, and this service of unloading grain out of cars which have brought it from the west and loading it into cars which carry it to points east, north and south is elevation and transfer in transit within the meaning of the amended Interstate Commerce Act.

The rate of transportation from points west of the Missouri River through the cities upon that river to St. Louis and other eastern points is the same to all shippers. All shippers are offered the option of sending their grain through these cities with or without elevation for the same price. The railroad company pays out of the amount it receives from this uniform rate three-fourths of a cent per hundred pounds to the elevator men at the River for the elevation of that part of the transported grain which is elevated in transit there in consideration of a prompt return and full use of its cars. It is insisted that this constitutes a rebate and an unjust discrimination because the net amount retained by the carrier is three-fourths of a cent less on grain elevated than on that which
353 is not elevated and because the shipper who elevates his grain receives a service that he who does not elevate it fails to obtain. But this is not a rebate because there is no concession from the published rate here, but an allowance in accordance with that rate, Section 2, and because the same service of elevation is offered to all shippers at the same price, and they are all able to accept it, and there is neither rebate nor unjust discrimination where such an offer is made, although some accept and others reject its advantages. Nicholson v. Great Western Railway Company, 1 Nev. McN. 121, 125, 149.

Much is said in argument of discrimination and preference. While general expressions may be found in the opinions of the courts to the effect that there must be no difference in charges not based on difference in service and that the Interstate Commerce Act was passd to secure equality of rates and to destroy favoritism New York, New Haven & Hartford R. R. Co., v. Interstate Commerce Commission, 200 U. S. 361, the legal effect of the act is that declared by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 43 Fed. 37, in these words, which have been three times affirmed and adopted by the Supreme Court as the true interpretation of the law:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference, or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

Interstate Commerce Commission v. Cincinnati, New
354 Orleans & Texas Pacific Ry. Co., 167 U. S. 479, 493, Cincinnati, New Orleans & Texas Pacific Ry. Co., v. Interstate

Commerce Commission, 162 U. S. 184, 196, 197; Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 173. The act does not prohibit all preferences or advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. Sec. 3, 24 Stat. 380; Sec. 15, 34 Stat. 589.

It is contended that the allowance of the three-fourths of a cent to the owners of terminal elevators for elevation at the River constitutes a discrimination against the owners of elevators at St. Louis and points east and west of the River to whom no such allowance is made and who cannot treat the grain during this elevation in transit. But to the companies whose termini are at the Missouri River elevation in transit there is a commercial necessity for which they have a right to pay in order that they may secure their share of the transportation and the full use of their cars. For this service they pay three-fourths of a cent per hundred pounds. The owners of elevators at other places cannot render this service and cannot treat this grain at these points, but they may do both and receive the compensation and benefit thereof by constructing elevators at the termini of the railroads at the Missouri River as those have done who do receive these benefits. The difference in allowance and in advantage is the just result of a difference in location and in the natural advantages of terminal elevators and cities upon the Missouri River and it constitutes neither unjust discrimination nor undue prejudice. The Union Pacific Company and the Chicago Great Western Company, which have no railroads at St. Louis, certainly cannot be required to give to the owners of elevators and dealers in grain there the same advantages which they bring to those at the termini of their railroads. The Supreme Court after a review of authorities, said: "In short, the substance of all these decisions is that railways are
355 only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge." Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 283; Harp v. Choctaw, Oklahoma & Gulf R. Co., 118 Fed. 169, 175, 125 Fed. 445, 450, 453.

Railroad companies carrying wheat out of St. Louis allow for elevation at that [illegible] three-fourths of a cent per hundred pounds on grain shipped [illegible] to the south and to the southeast, and one-fourth of a cent per hundred pounds on grain shipped out to the east, but they allow and pay nothing for elevation upon grain shipped into St. Louis from the west. Complaint is made that the payment by the carriers of three-fourths of a cent per hundred pounds for elevation at Omaha and Kansas City works a discrimination between the dealer in grain who owns an elevator at St. Louis and the dealer who owns one at Omaha in this, that if the former purchases grain west of the Missouri River, ships it through Omaha to his elevator at St. Louis and then out to some eastern point it costs him three-fourths of a cent per hundred pounds more at that point

than it would cost the dealer at Omaha who has passed the grain through his elevator. The answer is that the two dealers are not similarly situated. The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation which constitute a controlling factor at Omaha and Kansas City do not exist at St. Louis and that City is many hundred miles farther distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice. East Tennessee, V. & G. Ry. Co., v. Interstate Commerce Commission, 181 U. S. 1, 12; Interstate Commerce Commission v. Alabama Midland R. R. Co., 168 U. S. 144,
356 171, 175; Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 648, 671, 674.

The allowance for elevation at the Missouri River points has not been made to millers who own elevators and are engaged in milling in transit there and it is said that from this fact arises a discrimination in favor of millers at St. Louis who own elevators at Omaha or Kansas City and pass their grain through them. There is no discrimination here in favor of millers in St. Louis who have no ownership or operative control of an elevator at one of the Missouri River cities. There is no evidence that there is any miller in St. Louis who has such an ownership or control and this suggested discrimination is too theoretical and improbable to persuade. If, however, it exists, the remedy is to grant reparation to the millers who elevate their grain in transit in accordance with the schedules of the carriers at the Missouri River points, as the Commission has done in the cases of the operators of other elevators there, Nebraska Iowa Grain Company v. Union Pacific R. R. Co. (Jan'y 6, 1909, 15 I. C. C. R. 90), not to forbid all compensation for elevation in transit.

This brief review of the suggestions of counsel in support of the action of the Commission discloses no rebate, no unjust discrimination, no undue prejudice, nothing that may bring the sweeping orders before us within the delegated powers of that body. On the other hand, the enforcement of these orders cannot fail to cause great losses and to entail much discrimination. It will strike down the practice of a decade in reliance upon which elevators have been built, terminal grounds in large cities have been bought and equipped, contracts have been made, business and markets have grown up and business relations have been established. If the carriers whose roads terminate at the Missouri River cities may not pay for this elevation in transit they must furnish it themselves free or the producers and consumers whose grain passes over their roads must ultimately bear the expense of it. If they furnish it free, of if they construct elevators and charge a reasonable compensation for it, the owners of the terminal elevators at the River must
357 lose the use which in large part induced their construction and must lose a portion of their value. If the carriers charge for it, producers and consumers of grain, which on account of its origin must pass, or for other reasons does pass, over their railroads, must bear this charge, while those whose grain may pass over the

through roads may be free from it, and this fact will necessarily have the effect to divert grain and the business in it from the Missouri River cities and to diminish the value of all investments therein in facilities for conducting it.

While these facts bear upon the wisdom and expediency of the orders they are not unworthy of serious consideration in the determination of the question whether or not the power of the Commission to affect so radically the property rights and interests of the parties to these suits really exists. The conclusion of the whole matter is that the sweeping orders under consideration were beyond the delegated power of the Commission and for that reason they must be annulled and their enforcement must be enjoined. Peavey & Company pray for a recovery from the Union Pacific Company of compensation for services rendered by it between December 17, 1906 and October, 1908, when the bill in its case was filed in the elevation of grain at Omaha and Kansas City at the agreed rate of one and one-fourth cents per hundred pounds. But on April 9, 1907, the Commission reduced the rate of compensation for these services to three-fourths of a cent per hundred pounds, (12 I. C. C. R. 85, 90). Reasonable compensation for such services includes not only the cost of the services but reasonable reward therefor in addition, but the evidence fails to convince that three-fourths of a cent per hundred pounds then was or now is less than a reasonable compensation for these services. Peavey & Company may therefore recover of the Union Pacific Company for elevation services rendered prior to April 9, 1907, at the rate of one and one-fourth cents per hundred pounds and for such services rendered since that date at the rate of three-fourths of a cent per hundred pounds. Let decrees be entered in accordance with the conclusions announced in this opinion.

[Endorsed:] 3405, etc. Opoinion. (Comp.).

358 UNITED STATES OF AMERICA, *set:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States, for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors and all proceedings in the cause wherein F. H. Peavey and Company, et al., are complainants, and the Union Pacific Railroad Company, et al., are defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 27th day of April, A. D. 1910.

[Seal of the United States Circuit Court, for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk.*

359 In the Supreme Court of the United States, October Term, 1910.

In Equity. No. 555.

INTERSTATE COMMERCE COMMISSION
vs.
F. H. PEAVEY et al.

In Equity. No. 556.

UNION PACIFIC RAILROAD COMPANY
vs.
F. H. PEAVEY et al.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cases by their respective solicitors, that in printing the transcript of record the clerk may omit decisions of the Interstate Commerce Commission which are exhibits to the Cross-bill of the Union Pacific Railroad Company, since it appears that said decisions are also exhibits to the bill of complaint pertaining to said cases.

LLOYD W. BOWERS,
Solicitor General,
Counsel for Plaintiffs in Error.
N. H. LOOMIS,
F. C. DILLARD,
R. W. BLAIR,
EDSON RICH,
FRANK HAGERMAN,
Counsel for Defendants in Error.

MAXWELL EVARTS,
Of Counsel.

360 [Endorsed:] File Nos. 22,173 & 22,174. Supreme Court U. S. October Term, 1910. Term Nos. 555 & 556. The Interstate Commerce Commission, Appellant, vs. F. H. Peavy & Co. et al. Union Pacific Railroad Co., Appellant, vs. F. H. Peavy & Co. et al. Stipulation to omit parts of record in printing. Filed June 13, 1910.

361 In the Supreme Court of the United States, October Term, 1910.

In Equity. No. 555.

INTERSTATE COMMERCE COMMISSION
vs.
F. H. PEAVEY et al.

In Equity. No. 556.

UNION PACIFIC RAILROAD COMPANY
vs.
F. H. PEAVEY et al.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cases by their respective solicitors, that the following documents may be included in the transcript of the record in said cases as a part thereof, namely, stipulation relating to tariffs

C., R. I. & P.	Tariff	I. C. C.	No. C 8489,
"	"	"	C 8488,
C., B. & Q.	"	"	9277,
"	"	"	9275,
"	"	"	9276,
Union Pacific	"	"	2207,
M., K. & T.	"	"	A 3248,
Mo. Pacific	"	"	A 1050,
"	"	"	A 1284,
M., K. & T.	"	"	A 3327,

and letter pertaining to said stipulation dated April 27, 1910, and signed Walter H. Sanborn, U. S. Circuit Judge.

LLOYD W. BOWERS,
Solicitor General,
Counsel for Plaintiffs in Error.
N. H. LOOMIS,
FRANK HAGERMAN,
Counsel for Defendants in Error.

362 Department of Justice.

Office of United States Attorney,

Western District of Missouri.

KANSAS CITY, MO., *April* 28, 1910.

Hon. P. J. Farrell, Attorney, Interstate Commerce Commission, Washington, D. C.

SIR: Enclosed herewith please find letter of yesterday from Judge Sanborn, together with stipulation which I prepared and sent to him in the Union Pacific-Peavey case, which is self-explanatory.

The stipulation, with Judge Sanborn's letter, did not arrive here before the record was sent to Washington. I have Mr. Hagerman's promise that he will not make any sort of point on the filing of the exhibits, and inasmuch as the record has gone forward, I am at a loss to know what to do with it, unless it could be filed here now and sent as a supplemental record, but I doubt the necessity of going to that trouble.

Yours truly,

LESLIE J. LYONS,
Ass't United States Attorney.

L. J. L.—E.
Encl.

363 United States Circuit Court of Appeals, Eighth Circuit.

Hon. David J. Brewer, Circuit Justice, Washington, D. C.
Hon. Walter H. Sanborn, St. Paul, Minn.;
Hon. Willis Van Devanter, Cheyenne, Wyo.;
Hon. William C. Hook, Leavenworth, Kans.;
Hon. Elmer B. Adams, St. Louis, Mo., Circuit Judges.

ST. PAUL, MINNESOTA, *April* 27, 1910.

Leslie J. Lyons, Esq., Kansas City, Missouri.

DEAR SIR: The stipulation in Peavey and another against Union Pacific and another regarding the filing of certified copies of certain tariffs is approved and may be filed.

Yours truly,

WALTER H. SANBORN,
U. S. Circuit Judge.

364 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3405. In Equity.

F. H. PEAVEY et al.
vs.
UNION PACIFIC RAILROAD COMPANY et al.

Stipulation.

It is hereby agreed and stipulated by the Solicitors for the respective parties hereto that the certified copies of the tariffs hereinafter set forth, filed by Counsel for the Interstate Commerce Commission, on April 15th, 1910, in the above entitled cause, may be considered as filed as of the date the case was tried before the Circuit Court at St. Louis, Missouri, said date being the date when permission and authority was given by the Circuit Court for filing said tariffs.—the certified copies of said tariffs being as follows, to-wit:

C., R. I. & P.	Tariff	I. C. C.	No. C 8489.
"	"	"	C 8488.
C., B. & Q.	"	"	9277.
"	"	"	9275.
"	"	"	9276.
Union Pacific	"	"	2207.
M., K. & T.	"	"	A 3248.
Mo. Pacific	"	"	A 1050.
"	"	"	A 1284.
M., K. & T.	"	"	A 3327.

FRANK HAGERMAN,
Counsel for Plaintiffs.
P. J. FARRELL,
A. S. VAN VALKENBURGH,
Counsel for Interstate Commerce Commission.

365 [Endorsed:] No. 3405. In equity. In the Circuit Court of the United States for Western Division of Western District of Missouri. F. H. Peavey, et al., vs. Union Pacific R. R. Co. et al. Stipulation.

366 Union Pacific Railroad Company.

Law Department, Nebraska and Iowa.

Edson Rich, General Attorney, Omaha, Nebraska.

JUNE 6, 1910.

Mr. P. J. Farrell, Attorney, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I herewith enclose stipulation executed by Mr. Hagerman and by Mr. Loomis on behalf of the Union Pacific Railroad Co., with reference to including certain documents in the record in the Peavey case.

This in accordance with request from Mr. Hagerman.

Yours truly, EDSON RICH.

E. R.—D.

367 [Endorsed:] File Nos. 22,173 & 22,174. Supreme Court U. S. October Term, 1909. Term Nos. 555 & 556. The Interstate Commerce Commission, Appellant, vs. F. H. Peavy & Co. et al. Union Pacific Railroad Co., Appellant, — F. H. Peavy & Co. et al. Stipulation of counsel and addition to record. Filed June 13, 1910.

Endorsed on cover: File No. 22,173. W. Missouri C. C. U. S. Term No. 555. The Interstate Commerce Commission, appellant, vs. F. H. Peavey & Company, Omaha Elevator Company, and Midland Elevator Company. File No. 22,174. Term No. 556. Union Pacific Railroad Company, appellant, vs. F. H. Peavey & Company, Omaha Elevator Company, and Midland Elevator Company. Filed May 14th, 1910. File Nos. 22,173 and 22,174.

3

Office Supreme Court, U. S.
FILED.
OCT 9 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 286.

INTERSTATE COMMERCE COMMISSION

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

No. 287.

UNION PACIFIC RAILROAD COMPANY

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

MOTION.

ROBERT DUNLAP.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 286.

INTERSTATE COMMERCE COMMISSION

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

No. 287.

UNION PACIFIC RAILROAD COMPANY

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

Comes now Robert Dunlap, general attorney of The Atchison, Topeka and Santa Fe Railway Company, and moves this honorable court for leave to file brief as *amicus curiæ* herein.

ROBERT DUNLAP.

We hereby consent to the filing of brief in accordance with the above motion.

FRANK HAGERMAN,
Attorney for Peavey & Company, Omaha Elevator Company, and Midland Elevator Company.

F. C. DILLARD,
Attorney for Union Pacific Railroad Company.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

F. W. LEHMAN,
Solicitor General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 285.

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW AND CHARLES W. LONSDALE, as officers and members of the Board of Trade of Kansas City, *et al.*, *Appellees*.

No. 286.

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY AND MIDLAND ELEVATOR COMPANY, *Appellees*.

No. 287.

UNION PACIFIC RAILROAD COMPANY, *Cross Appellant*,

v.

F. H. PEAVEY, OMAHA ELEVATOR COMPANY, MIDLAND ELEVATOR COMPANY AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY BRIEF FOR APPELLEES, COMPLAINANTS BELOW.

A COMMON CARRIER ENGAGED IN COMMERCE AMONG THE SEVERAL STATES IS BOUND TO PERFORM THE FULL TRANSPORTATION SERVICE, AND MAY ENGAGE ANOTHER,

WHETHER SHIPPER OR NOT, TO PERFORM FOR IT WHAT IT OTHERWISE WOULD BE OBLIGED TO PERFORM AND MAKE COMPENSATION THEREFOR LIMITED ONLY BY THE RULE THAT ONLY A REASONABLE COMPENSATION MAY BE PAID FOR THE SERVICE AND THE INTERSTATE COMMERCE HAS NO POWER TO PROHIBIT PAYMENT FOR SUCH SERVICES.

I. C. C. Act as amended 1906, Secs. 1-15, U. S. Comp. Stat. Supp., 1909, pages 1150-1159.
Budd vs. New York, 143 U. S., 517.
Texas & Pacific v. I. C. C., 162 U. S., 197.
Southern Railway v. St. Louis Hay Co., 214 U. S., 297. I. C. C. v. Stickney, 215 U. S., 98.
In re allowances to elevators by Union Pacific, 10 I. C. R., 309; S. C., 12 I. C. R., 86.
In re party rate tickets, 12 I. C. R., 110.
City of Atchison vs. M. P. Ry. Co., 12 I. C. R., 112-114.
Consolidated Forwarding Co. v. Southern Pacific Co., 9 I. C. R., 182-206.
American National Live Stock Association, etc., v. Texas Pacific Ry. Co., 12 I. C. R., 32-36.
Merchants Cotton Press & Storage Co. v. I. C. C., 17 I. C. R., 78, 99, 101, etc.
Kentucky Railroad Commission v. L. & N. R., 10 I. C. R., 173.
In re unlawful rates, etc., in the transportation of cotton, 8 I. C. R., 121, 135; compressing of cotton in transit sustained.
Central Yellow Pine Assn. v V. S. & P. R. R. Co., 10 I. C. R., 193, 213; sawing and dressing of lumber in transit, sustained.
Lowell Cotton Mills v. Gulf & S. I. R. Co., 37 Southern Rep., 134; compressing of cotton in transit, sustained by Supreme Court of Mississippi.
Cowan v. Bond, 39 Fed., 54; compressing of cotton in transit, sustained.
I. C. C. v. B. & O. R. R. Co., 43 Fed., 50-51.
I. C. C. v. B. & O. R. R. Co., 145 U. S., 276.

Denby Main Colliery Co. v. M. S. & L. Ry. Co., L. R., 11, App. Cas., 97.
Pidcock v. M. S. & L. Ry. Co., 9 Ry. & Canal Traffic cases, 45.
Tennant v. C. Ry. Co., etc., 10 R. and C. Traffic cases, 194.
Hutchinson on Carriers, Sec. 538.

The fundamental question here involved does not concern the wisdom or power of the Interstate Commerce Commission to *regulate* the payment for services rendered by shippers who are also owners of elevators. The question is, has the Commission power to prohibit the shipper from rendering any service, however necessary and legal, to a carrier, for compensation?

The question of the rendition of service of the kind here involved is not new. The State of New York, in 1888, enacted a statute providing for a maximum charge for the like service which was sustained by this Court in Budd v. New York, 143 U. S., 517.

The orders of the Interstate Commerce Commission, while directed by name against the Union Pacific and certain other carriers, were intended to prohibit the payment of compensation by carriers for the service of elevation, weighing and transferring grain everywhere, and are intended to strike down a practice which has been in force for many years, as a result of which very large investments have been made throughout the country.

The territory in which the elevators here involved are situated, not limited to the Missouri River, but is bounded on the north by the Great Lakes, on the east by the Allegheny Mountains, on the south by the Ohio River, and on the west by the Missouri River, and embrace elevators situated in Illinois, Ohio, Indiana, Kentucky, Missouri, Kansas, Iowa and Nebraska; the elevators being lo-

cated, besides at the Missouri River points, at Chicago, Kankakee, Harvey and South Chicago, in Illinois, Cleveland, Cincinnati, Toledo and Columbus, Ohio, Hammond and Kentland, Indiana, and Louisville and Henderson, in Kentucky. (See paragraph 18, complainant's brief, 15.)

Two orders of the Commission are here involved; one dated July 29, 1908, directed specifically against the Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, and providing:

> "That they severally be required to cease and desist on or before the first day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying ¾ of one per cent. per hundred pounds, or any other sum as an allowance or compensation for services rendered in the elevation of grain at Kansas City, Missouri, and other Missouri River points on their respective lines, or points or places in their territory adjacent thereto."

and on October 16, 1908, upon an application of the carriers for rehearing, the Commission made its second order and said (Diffenbaugh, 23):

> "Our order in these cases runs only against points upon the Missouri River, and one ground most earnestly insisted upon by the petitioners is that to stop the granting of these allowances upon the Missouri River, while they continued elsewhere, would be to create a serious discrimination against that locality. This is self-evident. A cardinal consideration in reaching our conclusion was the belief that in no way could discrimination and preference be prevented except by the

> complete prohibition of these payments and privileges. The principle of our decision applies everywhere. We expect that the decision will be universally accepted by carriers."

We have, therefore, two records and, in a sense, two controversies. Counsel for the Commission state the difference between the Peavey case and the Diffenbaugh case as follows (Brief, 18):

> "It will be observed that the order in the Diffenbaugh case differs somewhat from the order in the Peavey case. * * * In the Peavey order, the Union Pacific is prohibited from paying any allowance to Peavey & Company on grain they are interested in which is held in their elevators at Kansas City or Council Bluffs more than ten days, or upon grain they are interested in which is mixed, treated, weighed or inspected in any of said elevators; while in the Diffenbaugh case the carriers involved are prohibited from paying any sum 'as an allowance or compensation for service rendered in the elevation of grain, at any of the Missouri River points or points adjacent to the Missouri River.' "

Counsel unduly limit the order of the Commission specifically involved in the Diffenbaugh case. It is not limited to Missouri River points, but is intended to and does cover the subject of elevation throughout all of the territory mentioned above (Complainants' bill, Diffenbaugh, 15).

A restatement of the facts in this reply brief would be of no service, because the necessity of the rendition of the service of elevation, the impossibility of returning to the old method of transferring the grain from car to car by hand, is conceded. Indeed, it is conceded that the service of elevation—that is, of transferring the grain from car to car and weighing the same—is a transportation service, and that its effect is to enable the carriers to retain their

equipment on their own lines, and to perform the service of transportation expeditiously; and it is not claimed that the method of transportation now in use increases the cost to the shipper. The stipulation in the Diffenbaugh case (149) contains this clause:

> "That is to say, where no elevation allowance is paid, the total charge for transportation paid by the shipper is the same as where an elevation allowance is paid."

On the contrary, if the Commission has power to prohibit the rendition of this service by the elevator owner for the carrier, or prohibit payment of compensation therefor by the carrier, it would necessarily increase the cost of transportation to the owner of the grain. It is likewise provided by said stipulation (Diffenbaugh, 151):

> "That the use of the modern elevator in the great market places has become necessary to the railroads, and in the past recent years the railroads have encouraged their building, maintenance and operation at all Missouri River markets."

This is equally true of all other points mentioned in this cause.

Counsel for the Commission likewise concede that payment for the service of *elevation, as such*, does not work an undue preference or undue prejudice, unless the compensation paid by the carrier is unreasonable; and no claim is here made that the amount paid is unreasonable. In the brief of counsel, he says (39):

> "If, while the grain is being so transferred, it is not stored as aforesaid, and the owner is not permitted to clean, clip, mix or otherwise treat it, or to have that

service performed in his behalf by some third party, there will be no undue preference or undue prejudice, unless the compensation paid by the carrier for the transfer is unreasonable."

But he adds:

"Since, as a commercial proposition, grain must be stored in elevators as above, and weighed, inspected, clipped, cleaned, mixed and otherwise treated there, and cannot be so stored, etc., unless it is transferred from car to car through an elevator, any sum paid by a carrier for such transfer, where the transfer is performed in connection with the other services mentioned, regardless of whether the payment is more than a reasonable compensation for the transfer service, gives to the owner of the grain an advantage over his competitors who do not receive a like payment."

In view of this admission, it is important to repeat briefly the history of the subject here involved, as dealt with by the Commission. On June 25, 1904 (Diffenbaugh, 81), the Commission, after exhaustively considering the Peavey contract, reached this conclusion (96):

Knapp, Chairman:

"However objectionable the arrangement in question may appear from any point of view, we are convinced, rather against our original impressions, that it cannot be adjudged unlawful. This conclusion follows from our determination of the controlling facts, and there is no occasion for extended comment. We have found that these contracts for transferring grain were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service performed. The parties were competent to con-

tract; the thing done is proper and necessary to protect the interest of the carrier; the consideration is not excessive, and the honesty of the transaction is unimpeached."

At the time of this hearing in 1904 the Commission must have entertained some question as to their power to *regulate* the amount of compensation to be paid for the service, for, in 1905, it applied to Congress for an additional grant of power. In its report to Congress it used this pertinent language:

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system."

The report was in these words:

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier by paying such owner an extravagant sum for the service rendered thereby, prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of excessive mileage upon the private car which conveys the property of the owner of the car.

"Our investigations leave no room for doubt that

all these methods are, at the present time, more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. *We hesitate to recommend at this time so drastic a measure as that.* Assuming that such a law would be a constitutional exercise of authority it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously, both to shipper and railway, and without injury to the public, if provided by the shipper himself. We do think, however, the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate and any remedy is extremely difficult of application but nothing better appears to be available."

At the time of this report, Congress had not specifically dealt with the payment of compensation for services rendered by the shipper, nor had it defined the terms governing the same, but in response to the request of the Commission, in June, 1906, it amended the Interstate Commerce Act. By Section 1 as amended (U. S. Stat., Supp. 1909, 1150) it defined the word "transportation" as follows:

> "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

And it amended Section 15 to read (Suppl. 1909, p. 1159) as follows:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered, or for the use of the instrumentality so furnished and fix the same by appropriate order."

After these amendments were in full operation, the Commission again reviewed the subject (Diffenbaugh, 99), and in a report by Mr. Commissioner Harlan (101), said:

> "Elevation, as commonly understood among elevator men and among buyers and sellers of grain, signifies the unloading of grain from cars, or from grain-carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days. The 'treatment,' or grading, cleaning and clipping, of grain is not properly a part of 'elevation' as the word is strictly used, and the retention of grain in an elevator beyond the period of ten days becomes storage, and is not elevation. It is in this sense that the word is used in the amended statute. Without undertaking at this time definitely to decide to what extent under the amended act the furnishing of elevation as thus defined is a compulsory requirement, it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers, if it finds it to its interest to do so. This being the case, we see no warrant in law for holding, as is suggested, that such elevation cannot be provided at destination and is lawful only for the transfer of grain in transit. The law seems to clothe carriers with

> the right to furnish elevation at any point where it may be a convenience to shippers. The only restriction imposed by the act in that connection is that the elevation offered, like any other service a carrier may hold out to shippers as an inducement to send their traffic over its line, must be open to all on equal and reasonable terms."

The result of this rehearing was that the Commission adhered to its conclusion that payment for the services was legal, but held that the one and a quarter cents per hundred pounds theretofore paid was excessive, and reduced the compensation to be paid, to three-quarters of a cent per one hundred pounds. Mr. Commissioner Harlan said (105):

> "We are satisfied, from the information acquired in this and other investigations as to the charges and practices at other points where large quantities of grain are handled and transferred, that an allowance of three-quarters of one cent will fully and amply cover the actual cost of the elevation contemplated in the law, without returning a profit and thus becoming a rebate."

No further evidence has since been taken by the Commission or heard by it, and no new facts have been brought to its attention and nothing has occurred to indicate that the finding of the Commission, thus expressed, did not represent the actual facts, and are still the actual facts; that is, using the word "elevation" technically, as Commissioner Harlan did, three-quarters of a cent per hundred pounds represents the actual cost of *the elevation contemplated in the law*. This, of course, excludes payment for the "treatment" defined by Commissioner Harlan as grading, cleaning and clipping.

We come then to the question: Had the Commission power, in view of the admitted facts, to prohibit the payment of any compensation for the service which they concede to be rightfully rendered?

From the orders of the Commission and the brief of counsel, it is evident that it proposes not only to assert a power which it does not possess, but to nullify the provisions of the act of Congress, passed at its request, to cover the specific matter here involved.

After stating (Brief, 39), "If, while grain is being so transferred, it is not stored as aforesaid, and the owner is not permitted to clean, clip, mix or otherwise treat it, or to have that service performed in its behalf by some third party, there will be no undue preference or undue prejudice," counsel for the Commission, speaking of certain difficulties which they believe flow from the payment of such compensation, says:

> "These difficulties are not imaginary. They are real; and experience with them for several years has caused the Commission, contrary to its first impression, as above shown, to conclude that the prohibition against undue preference and undue prejudice contained in Section 3 cannot be enforced, unless the carriers can be compelled to separate the interest they have in securing the release of their equipment from the interest grain dealers, whose shipments of grain are transferred through elevators, have in cleaning, clipping, mixing and otherwise treating the grain while it is being so transferred. The orders under consideration, if permitted to have full force and effect, will render impossible the discrimination referred to; but we believe it would not be possible for orders less comprehensive to produce that result."

In other words, it insists upon the right and power to prohibit payment not because the service of eleva-

tion, weighing and transfer may not legally be compensated for, but because the shipper receives an added service for which he does not pay.

The answer of the Circuit Court to this contention seems to us conclusive.

Sanborn, J. (Diffenbaugh, 288), said:

> "Reasonable compensation for transfer services may not be denied, lawfully, because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the Commission to forbid carriers from paying or allowing, for the elevation and transfer of grain in transit, reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance, than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.
>
> "The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting, and grading of it is a trade service; it is no part of transportation and is not a transportation service. No power has ever been granted to the Interstate Commerce Commission to regulate, to prohibit, to separate by miles from the service of elevation and transfer, or from any other transportation service, or to interfere with this trade service. The advantages derived from it are of the same nature as those which the owners of mills enjoy who manufacture into flour in transit the wheat which they own and ship, who saw into lumber in transit the logs which they own and ship, and who dress in transit the rough lumber which they own and ship. They are of the same nature as those which the owners and shippers of cotton, who practically own the compresses, derive from compressing the cotton in

transit; and yet in all these cases the carriers maintain and the Commission sustains the same rates of transportation for the shippers who own the mills, the compresses and the articles transported, and the shippers who own none of these facilities of trade and derive none of the advantages thereof."

"It is no part of the duty, nor is it within the power of the Commission, to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than one who loads it from a wagon. Harp v. Choctaw, Oklahoma & Gulf R. Co., 125 Fed., 445. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership and not to the transportation of the articles shipped and the consideration and regulation of these advantages are without the scope of the Commission's power." (176 Fed., 409.)

Counsel, in his brief and oral argument, treats the question of the payment of compensation for elevation and transfer service as if it had its origin in the Peavey contract made in 1899, and likewise as if the payment was limited to the Missouri River. This is a fundamental error. The practice has long prevailed at terminal points throughout the country, both by rail and water; and in 1888, as heretofore mentioned, became the subject of an enactment by the New York legislature. Mr. Justice Blatchford, in Budd v. New York, 143 U. S., 517, in delivering the opinion of this Court sustaining the validity of the statute, said:

> "That a larger proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds it way through the Erie Canal and Hudson River to the seaport of New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities of the business of the common carriers and, in a broad sense, performing the work of carriers to and located upon or adjacent to the waters of the State and transferring the cargoes of grain from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects."

If the Commission has power to prohibit payment for a service so fully recognized and so long in vogue it must rest upon the statute which creates the Commission, it can not be implied, the power of the Commission while ample for many purposes is after all a limited power. This Court, speaking by Mr. Justice Shiras, in Texas & Pacific v. I. C. C., 162 U. S., 197, said:

> "It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission."

Manifestly there can be nothing *per se* illegal in the payment for the services of elevation. Indeed, since the Commission made its finding in June, 1908, it has made an al-

lowance against the Union Pacific Railroad Company, on behalf of certain elevator owners in payment for like elevation service, and has rendered judgment therefor which has been paid. (Nebraska & Iowa Grain Co., etc., v. Union Pacific R. R. Co., 15 I. C., 90.) The syllabus of its decision is:

> "The various complainants herein seek reparation caused by alleged undue discrimination against them in favor of competitors in elevator allowance made by defendant at Omaha and Council Bluffs. Defendant declined to pay these allowances, alleging that they were unlawful and the terms of the tariffs were not complied with. Held that this Commission cannot without stultifying itself, make any ruling which will condemn as unlawful the payment of these allowances during the time they would be expressly sanctioned by its decisions."

The Commission sanctioned a similar practice in many other commodities in *Merchants Cotton Press & Storage Company v. I. C. R. R.* decided June 24, 1909, the Cotton Press case. (17 I.C. R., 78, 79, 101.)

Objection was made to the allowance by carriers to the Warehouse Company of 50 cents a bale for compression and 10 cents switching and transfer.

In sustaining the allowance the Commission said (104):

> "Concerning both these allowances, the one for compression and the other for handling the cotton in the South Memphis plant, some further observation may properly be made. * * * Compression is a service which the carrier procures for its own convenience, and when that service is performed in such manner as not to prejudice or prefer a particular shipper or community the act does not limit the freedom of the car-

rier to make contracts in respect thereto. Of course, if the arrangement made in any case results in undue preference or prejudice to shippers, the Commission has jurisdiction to correct the wrongdoing. *Muskogee Commercial Club v. M., K. & T. Ry. Co.*, 12 I. C. C. Rep., 312.

"But complainants show that about 80 per cent of the stock of the Memphis Warehouse Company is held by persons who are dealers in cotton, and therefore contend that any profit which accrues to the corporation finds its way into the pockets of cotton shippers, and is in the nature of a rebate; and that, under the decisions in the Peavey cases, the allowance for compression and switching are unlawful to the extent that they exceed the actual cost of service, in that they are in reality allowances to shippers through the medium of stock ownership in the corporation.

"We are unable to reach such a conclusion on the facts appearing in this record."

The Commission again sustained a similar payment as applied to transportation of lumber.

In *Central Yellow Pine Association v. V., S. & P. R. R. Co.*, 10 I. C. R., 193, it said (213-214):

"The real question is, therefore, can a railway which receives logs at a point upon its line, and transports those logs to a sawmill where they are manufactured into lumber, treat the lumber as originating where the log did, and make such an allowance towards the transportation of the logs as would be a fair compensation for hauling the lumber from that point. In other words, can the principle of milling in transit be applied to the manufacture of logs into lumber?

"It is well understood that at the present time this principle is applied to the movement of many commodities.

"It may be urged with much force that the act to regulate commerce does not sanction arrangements of this kind and the Commission early in its history in-

timated that such might finally be its conclusion. *Crews v. Richmond & D. R. Co.*, 1 I. C. C. Rep., 401; 1 I. C. C. Rep., 703. Such practices were, however, in use to a considerable extent at the time of the passage of the act and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of consumption it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture. * * * Values have adjusted themselves to this situation. Lands have been purchased, mills located, large amounts of money invested upon the theory that the system would be continued. While the mill owner has no legal vested right of this sort which he can assert, there is a moral obligation resting upon the railway company to continue the practice, if it can do so legally. So far as can be seen the mill owner, the railway, the purchaser of lumber are all benefited. It seems plain to us that we ought not to interfere unless the positive mandate of the law requires it, and with considerable hesitation we conclude that it does not."

And to transportation of live stock *American Live Stock Association v. Texas & Pacific*, 12 I. C. R., 32. The railway company had abolished certain joint and through rate tariffs which allowed for through transportation over connecting lines. The Commission (p. 36) said:

> "They (the carriers) must assume the burden of proving the necessary equipment for the through transportation, and if the stock is in fact transferred at a junction point the shipper is relieved of the burden of arranging for the details of this transfer."

If payment in these and other cases cited, why not in the transportation of grain?

Indeed, the right of the carrier to pay compensation for all transportation service rendered for it by another has been settled by this Court.

Southern Ry. Co. v. St. Louis Hay Co., 214 U. S., 98.

I. C. C. v. Stickney, 215 U. S., 98.

II.

THE DEMURRER.

Counsel insists the demurrer of the Commission should have been sustained to the bill in the Diffenbaugh case, and, at the same time, properly brings to the attention of the Court the fact that there was filed in the Circuit Court a request by the Interstate Commerce Commission, as follows:

> "The defendant desires a judicial interpretation of this question. It would be glad to have the Court entertain jurisdiction upon this petition and dispose of the matter as though brought upon the petition of a carrier against whom the order was directed. It does not, however, believe that the Court can entertain such jurisdiction upon the application of these petitioners, and deems it its duty to make this objection *in limine*."

While the order of the Commission did not run against appellees in the Diffenbaugh case, or specifically against the four railroads, intervenors herein (they adopted the complainants' bill (see Diffenbaugh Record, pp. 241, 257)), the order does, in terms, run against the *subject* and forbids payment of compensation for elevation service by any carrier anywhere. The language has been quoted, but may be repeated (Diffenbaugh, 23):

> "The principle of our decision applies everywhere. We expect that the decision will be universally accepted by carriers."

The effect, therefore, if the order stands is to strike down not only the contracts specifically involved in the Peavey case and the tariffs filed by the railroads named by the Commission, but the custom which had long prevailed, and affected all carriers, whether by land or water, and all elevator owners, wherever situated. To say that a carrier or an elevator owner thus affected would not have a right to come into a court of equity and seek relief, is equivalent to saying that a person is not entitled to his day in court, and may be deprived of his property without due process.

The opinion of the Circuit Court is a sufficient argument upon this question.

Sanborn, J. (285), said:

> "The demurrer to the bill of Diffenbaugh and his associates presents two objections: That the complainants were not parties to the proceeding before the Commission upon which the order challenged is based, and that there is no equity in the bill. But this is a controversy between competitors in transportation and in trade, between the traffic bureau of St. Louis and the owners of the lines of railroad which extend from the grain fields of Kansas and Nebraska through the Missouri River cities upon one side and the boards of trade, the owners of elevators, and dealers of grain in the Missouri River Cities and the railroad companies whose termini are at those cities on the other. The former are interested in opposition to the transfer of grain at those cities and to any allowance therefor; the latter are interested to promote the transfer of grain in those cities and to secure an allowance therefor. One of the parties opposed to this transfer upon

notice to other parties who are equally opposed to it, and without any notice to any party in favor of it, has procured this final order of the Commission, which prohibits the railroad companies from making any allowance for the elevation, necessarily deteriorates the value of the property, diminishes the volume and the profit of the business, strikes down profitable contracts, and destroys the right of parties in favor of the transfer to make such contracts. These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing before the Commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order because none of their interests are irreparably or at all injured, and if those whose interests are injuriously affected may not assail it, the order is impregnable. This cannot be the true rule of right or practice. A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Court. Sec. 16, as amended, 34 Stat., 592. The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a Federal court of equity for relief. Such an order issued without notice to the parties injuriously affected and without opportunity to them to present

meritorious defenses is not more conclusive than a judgment of a court, and Chief Justice Marshall declared in Marine Insurance Company v. Hodgson, 7 Cranch, 332, 336, that 'Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' (Citing a number of cases.) The complainants in the Diffenbaugh case are entitled to challenge the order of the Commission in this Court; the allegations in their bill that this order was beyond the power of the Commission and will irreparably injure their property and their business present good ground for equitable relief." (176 Fed., 409.)

III.

Counsel complains that the Circuit Court substituted its own judgment for the judgment of the Commission concerning the character of the alleged discrimination and preference upon which the orders in question are based. The decision of the Circuit Court rests upon the broad ground that, as a matter of law, the Commission had no power to prohibit payment of a reasonable compensation for the transportation services actually rendered the carriers in the elevation of grain; that the act of Congress (Section 15) specifically authorized such payment, that the attempt to prohibit denies to appellees (complainants below) their constitutional rights, and, in effect, held that the Commission attempted indirectly to abrogate and nullify the statute.

We respectfully urge, therefore, that the judgment of the Circuit Court be affirmed.

FRANK HAGERMAN,
JOHN BARTON PAYNE,
Solicitors for Appellees, Complainants below.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

INTERSTATE COMMERCE COMMISSION, appellant, *v.* HARRY J. DIFFENBAUGH ET AL.	No. 554.
INTERSTATE COMMERCE COMMISSION, appellant, *v.* F. H. PEAVEY & COMPANY ET AL.	No. 555.
UNION PACIFIC RAILROAD COMPANY, appellant, *v.* F. H. PEAVEY & COMPANY ET AL.	No. 556.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

MOTION TO ADVANCE.

On behalf of the Interstate Commerce Commission, appellant, the Solicitor General respectfully moves the court to advance the above-entitled causes for hearing during the October term, 1911, for the following reasons:

1. These are appeals by the Interstate Commerce Commission and the Union Pacific Railroad Co. from

final decrees of the Circuit Court of the United States for the Western District of Missouri, Western Division, in two suits instituted in said court by individuals and associations representing the commercial interests of Kansas City, Omaha, and other cities located along the Missouri River, under the provisions of section 16 of the act to regulate commerce as amended, enjoining enforcement of two orders of the said commission requiring carriers who serve said Missouri River points to cease and desist from paying so-called elevation allowances on grain transported from points in Kansas and Nebraska to, and unloaded into, elevators at the river and afterwards forwarded to final destination points east of the river.

2. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," etc., approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
Solicitor General.

APRIL, 1911.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW AND CHARLES W. LONSDALE, as officers and members of the Board of Trade of Kansas City *et al.*,
Appellees.
No. 285

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY AND MIDLAND ELEVATOR COMPANY,
Appellees.
No. 286

UNION PACIFIC RAILROAD COMPANY,
Cross Appellant,
v.
F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, MIDLAND ELEVATOR COMPANY AND INTERSTATE COMMERCE COMMISSION,
Appellees.
No. 287

BRIEF OF APPELLEES, COMPLAINANTS BELOW.

JOHN BARTON PAYNE,
M. B. KOON,
FRANK HAGERMAN,
Solicitors for Appellees, Complainants below.

John C. Rovard, Printer, 713 Baltimore Ave., Kansas City, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION, *Appellant,* v. HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW AND CHARLES W. LONSDALE, as officers and members of the Board of Trade of Kansas City *et al.*, *Appellees.*	No. 285
THE INTERSTATE COMMERCE COMMISSION, *Appellant,* v. F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY AND MIDLAND ELEVATOR COMPANY, *Appellees.*	No. 286
UNION PACIFIC RAILROAD COMPANY, *Cross Appellant,* v. F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, MIDLAND ELEVATOR COMPANY AND INTERSTATE COMMERCE COMMISSION, *Appellees.*	No. 287

BRIEF OF APPELLEES, COMPLAINANTS BELOW.

STATEMENT.

1. *Necessity of considering together the appeals in cases numbered* 285 *and* 286 *and the cross appeal in number* 287.

Cases numbered 285 and 286 are appeals from injunctive decrees of the Circuit Court for the Western District of Missouri in two cases against the Interstate Commerce Commission involving the right of a railroad company to pay an elevator operator at its terminus at a general market for the transfer and elevation of grain. The cases were heard and determined under the expediting act by Circuit Judges Sanborn, Hook and Adams. An elaborate opinion (176 Fed. Rep., 409; Rec., 285, pp. 277-296; Nos. 286, 287, pp. 314-332) by Judge Sanborn was delivered below. For convenience the cases may be designated as the Peavey (referred to herein as Nos. 286, 287) and Diffenbaugh (referred to herein as No. 285) cases. In the Peavey case there is a cross appeal (No. 287) prosecuted by the Union Pacific Railroad Company. While there are separate and complete printed records in the two cases, the appeal in No. 286 and the cross appeal in 287 appearing in one record, yet they were tried below (Stipulation, No. 286, 287, pp. 165, 181-183; No. 285, p. 149) upon the same evidence. The facts out of which the litigation grew, the various steps taken by the Commission, the congressional legislation relative to the question in controversy, and the single opinion below, make it desirable, if not absolutely necessary, for a clear understanding of the controversy, that the cases be submitted upon one brief and one argument. In fact the records in the two cases, with the exception of the pleadings and decrees, are duplicates, and even they do not in substance differ.

2. *The difference between the cases.*

(a) The Peavey case was brought (Rec., Nos. 286, 287, Bill, pp. 1-12) by F. H. Peavey & Co. and two of its subsidiary companies, the Omaha Elevator Company of Omaha, and Midland Elevator Company of Kansas City, to recover from the Union Pacific Railroad Company for services rendered under a written

contract of February 9, 1899, for transferring and elevating grain at the Peavey & Co. Omaha and Kansas City elevators, operated by its subsidiaries, and to set aside and enjoin the enforcement of an order (Rec., Nos. 286, 287, exhibit 4, pp. 38-40) of the Interstate Commerce Commission of June 29, 1908, setting aside and forbidding the continuation of an arrangement for the rendition of such services and the payment therefor under that contract. This was upon the ground that a payment for such a service to a shipper or owner of grain would operate as a rebate or discrimination. The decree (Rec., Nos. 286, 287, p. 305) not only annulled and enjoined the enforcement of the order, but also directed the Union Pacific to pay amounts due. From this result the Commission (Nos. 286, 287, pp. 310, 312) and Union Pacific (*id.*, 309) prosecuted separate appeals though, as already stated, the record in the two cases was printed in one volume.

(b) The Diffenbaugh case (No. 285) was instituted by the officers and members of the Boards of Trade and Grain Exchanges of Kansas City, Mo., Omaha, Neb., St. Joseph, Mo., and Atchison, Kan., now large grain markets upon the Missouri river, to set aside and enjoin the enforcement of an order of the Commission of June 29, 1908, (Rec., No. 286, p. 22) prohibiting four other railroads operating in those cities from making any payment to any elevator for service rendered in the transfer and elevation of grain thereat. From a decree for complainants (Rec., No. 285, pp. 273, 276) the Commission (*id.*, p. 273) appealed.

3. *Various interests involved in the litigation.*

(a) Peavey & Co., one of the great grain concerns of the country, at much expense, in 1899 constructed large elevators in Omaha and Kansas City upon the faith and solely because of contracts with the Union Pacific Railroad Company, whereby the latter, in consideration thereof, and for services to be performed in ele-

vating and transferring grain thereat, agreed to pay a reasonable charge for such service with the grain brought by that road to its Missouri river termini at said cities. A large grain business was built up along the line of that road; vast quantities of grain were carried by it and unloaded at these elevators where the same were placed and then transferred to the cars of other roads leading east, north and south as they could be obtained and the necessity for shipment arose. Some of the grain was consumed locally, but for the elevation or transfer of that no payment was to be or ever was made. In the enforcement of that contract Peavey & Co. has a direct interest.

(b) The Union Pacific openly, not secretly, but in absolute good faith, made the contract because of the necessity of having its equipment released at the termini of its lines which extended from the Missouri river to the west, reaching the grain fields of Kansas and Nebraska. The eastern termini were at Omaha and Kansas City. During the entire course of the litigation the attitude of that company was, and its interest is, this: The Peavey contract was fair and just and should be carried out; the elevation service was at the termini of a railroad and at a great market necessary and owing by the railroad, but could be more economically performed by an elevator operator. The only way to account for its cross appeal is that it was held liable to others in suits for alleged discriminations because of payments under the Peavey contract, and by appealing all of these cases and taking a cross appeal in the Peavey case, the entire question of its liability would be here properly determined, although the cross bill herein was only to the effect that, if its contract with Peavey was illegal, it should be relieved therefrom by its cancellation.

(c) Other great systems of railroads have their western termini at the Missouri river. These are the Wabash, Chicago

Great Western, Chicago & Alton, and Chicago, Milwaukee & St. Paul Railway Companies. They filed intervening petitions (Rec., No. 285, pp. 243, 247, 251, 254) in the Diffenbaugh case (No. 285) under leave (Decree, Rec., No. 285, p. 272) given, if their cases should be, as they were, submitted upon the evidence theretofore taken. Their interest in the case arises from this: If the grain be brought to Missouri river points and there placed in large elevators, then when shipped out they will have their chance to compete for that part of the haul which is had beyond the river. If, however, the practice be stopped of elevating and transferring through the river elevators, the tendency will be for the grain to go through. In that event those companies having lines extending both east and west of the river will obtain the entire haul. For this reason such lines are opposed to any elevator allowance, while those terminating at the river are in favor thereof. Several of the through lines, notably the Atchison, Topeka & Santa Fe; Chicago, Burlington & Quincy; Missouri Pacific, and Chicago, Rock Island & Pacific Railway Companies took (Rec., No. 286, 287, pp. 13, 23, 26, 35, 38, 41) an active part in this litigation before the Commission, their officers (*id.*, pp. 198, 200, 201, 203, 206) being the chief witnesses against Peavey & Co. In fact they were the instigators thereof. One or more of them will file briefs herein. The Diffenbaugh case (Rec., No. 285) was to enjoin the enforcement of an order made at the instance of an exchange at St. Louis in litigation against these roads, commanding them to act, as they really desired to do, i. e., cease to transfer and elevate at Missouri river points only. No one having any real interest was a party to, or notified of, the proceeding (Rec., 285, Bill p. 12, Par. 12; Answer, p. 52, par. 12) so there was a well grounded suspicion that they caused to be instigated a proceeding against themselves to have themselves forbidden from indulging in a practice which they wanted stopped.

(d) The grain dealers at the Missouri river points are vitally interested in maintaining the practice. It helps to make and neces-

sarily maintains a market. Large quantities of grain come into the great elevators there located and are offered for sale locally and to other markets. If, however, no payment is made for the transfer and elevation, then every incentive will be to send the grain upon through trains to eastern and southern markets.

(e) The result is that the various interests here represented are:

First: Peavey & Co., which has a good faith contract to be paid for the elevation and transfer of its grain, upon the faith of which it invested large sums in building elevators.

Second: The Union Pacific Railroad Company, the eastern termini of which it at the Missouri river, which in good faith made its contract for the purpose of having quick releases of its equipment, always in the short grain season in constant demand.

Third: All grain dealers in Missouri river cities, who have made large investments upon the faith of the practice and the fact that markets were there established. Their interest is not only in the protection of their investments, but also in maintaining any practice which tends to aid their grain markets in having the grain first brought there, exposed for sale and afterwards shipped on at the balance of the through rate to that which is ultimately decided to be the destination; an interest to which the entire Missouri valley is alive.

Fourth: All railroads whose western terminus is at the Missouri river, want part of the through haul. For this they have a chance to compete only in case the grain is first brought to these Missouri river markets and thereafter shipped therefrom to such points as sales upon the market have determined to be the ultimate destination.

Fifth: All railroads having lines extending from the west and the east of the Missouri river are vitally interested in breaking up the practice in order to prevent the stoppage of any grain at Missouri river points. In that way the entire haul will go by

their lines and those lines terminating at the river will not be able to compete therefor.

4. *General facts as to the Peavey case.*

(a) The Missouri river cities have been for years called "primary" or "intermediate" markets for grain, because they are located intermediately between the grain-producing fields of the west and the final markets of consumption in the east, south and abroad. They are served by many lines of railway; some reaching the great western grain fields and terminating at the Missouri river; others having their western termini at said cities and extending in an easterly, northerly and southerly direction therefrom to the ocean, great lakes and other markets and milling centers; and still others having lines traversing the producing section and extending through these Missouri river cities to the eastern, northern and southern markets. Thus a condition of intense competition has been engendered between the lines for the carriage of the grain to and from these "primary" or "intermediate" markets to the final markets of destination.

(b) In the year 1907 the total volume of business (Stipulation, Rec., No. 285, pp. 149-150), handled in and out of these Missouri river cities was:

	Bushels	*Valued at*
Kansas City	111,033,450	$70,739,930
Omaha	85,195,200	49,104,344
St. Joseph	6,500,000	9,000,000
Atchison	7,000,000	5,000,000

Of this great volume, not more than ten per cent is consumed at those "intermediate" markets. The balance comes to those markets and consequently continues its journey to the consumers of the north, east and south. The development of these "intermediate" markets can be largely attributed to certain transporta-

tion reasons. It is well known that the movement of grain is not constant throughout the year, but is confined to short periods during the crop seasons. With the harvest time naturally comes a pressing demand for cars, a demand so great as to frequently result in a car famine. Hence the deplorable condition of the volume of traffic exceeding facilities for its transportation to market, obtained, and long ago became a subject of serious consideration at the hands of the carriers. The railways having eastern termini at these Missouri river cities could ill afford to allow their cars to run beyond said cities in order to carry to distant destinations the grain originating on their lines, as by so doing their equipment was absent for long and uncertain periods. The lines running through these cities were in somewhat the same position. They could not conveniently allow their cars to run beyond to their far distant termini, as then too much time was consumed in returning them to the fields for further loading. On the other hand those lines having western termini at these Missouri river cities, but not having lines extending into the grain fields, were interested in bringing about a situation which would enable them to get some of this grain for transportation *from* these "intermediate" markets, and at the same time keep their own cars upon their own tracks, so the loading of cars at country stations was and is comparatively light on account of local conditions at the points of origin, consequently the economical movement of the grain for the long distances carried to the final points of destination east of the Missouri river required heavier loading than could be secured at the local stations of the initial lines. To meet these various situations, brought about by such competitive and operating conditions, the railways encouraged the development of these "primary" or "intermediate" stopping markets by providing for the transfer of the grain from the initial cars to other cars thereat, said markets being selected because of their geographical locations close to the grain fields, and because the western and eastern termini of so many of

the railways were at said cities. This transfer-in-transit was at first effected by shovel from car to car, the loaded car being switched upon a track elevated about three or four feet above an adjoining track where was placed the empty car into which the grain was to be shoveled, *i. e.*, transferred. This crude process consumed much time, entailed more or less loss of grain and caused congestion, and was finally abandoned in favor of the modern grain elevator. (Opinion Knapp Com. (10 I. C. C. 309; Rec. 286, pp. 13-25; Evidence Monroe, *id.*, 189-193, 252-259; Heffelfinger, *id.*, 193-197, 262-265; Stohr, *id.*, 197-198; Peck, *id.*, 213-216; Brodnax, *id.*, 250-252).

(c) The published tariffs issued by the railways provide for the charging and collecting of grain rates on the basis of so much per hundred pounds, and to ascertain the total charges on a carload it has always been necessary to provide facilities for securing the correct weights of all carloads. As grain is carried in ordinary box cars, a loss is not infrequently sustained, consequently weighing facilities are necessary to the carriers for checking and verifying the shipper's claim for the amount of such loss. These weighing facilities were at first provided by installing track scales upon which the loaded cars were switched and weighed. For various reasons this method was unsatisfactory, was therefore abandoned, and the plan of securing weights by means of hopper scales in elevators adopted. This plan has continued until it has become a universal custom at these Missouri river, as well as other, *market* centers. (Rec. No. 285, p. 150, par. 4.)

(d) The railways could meet these various situations by performing the services with their own appliances and employees, or by contracting with others to perform them. The latter course was adopted by the Union Pacific, and thereupon *it sought out* and on February 7, 1899, entered into a contract with Peavey & Co.

(Exhibits A. and B, Union Pacific Cross-bill; Rec. No. 286, pp. 126-132), to perform such services at Omaha, one of the eastern termini of its road. It is not necessary to recite here the terms of this contract in detail, but suffice it to say that the Commission found, and no one denies, that it was entered into in good faith, there was nothing secret about it (*id.*, 20) and a modern grain elevator at Omaha of one million bushels capacity was erected, in reliance thereon, by Peavey & Co. at a cost of $200,000. Later the same arrangement was made to cover the performance of similar services at Kansas City, the other terminus of the Union Pacific, where a large and costly elevator was constructed.

(e) In July, 1902, the Commission of its own motion made inquiry of these arrangements and contracts between the Union Pacific and Peavey & Co., but took no action with reference thereto. Afterwards, upon May 7, 1903, the Commission, at the instigation of a rival carrier of the Union Pacific, instituted a second investigation. The Union Pacific and Peavey & Co. appeared and each, among other things, contended that the Commission had no jurisdiction and could therefore make no order relative to the matter, because the fact was that said services of elevating and transferring grain were but incidents to, as distinguished from interstate commerce itself, hence not within the Interstate Commerce Act, under which the Commission was acting. After hearing much evidence there were submitted extended printed and oral arguments on behalf of Peavey & Co., the Union Pacific, its rival carriers and the Commission. The latter, through Chairman Knapp, upon June 25, 1904, rendered an able and elaborate opinion finding and declaring among other things, that the said arrangements were entered into in good faith, and large sums of money expended in reliance thereon; that the transfer and elevation services were only made at the termini of the railroad and were absolutely essential and indispensibly necessary for the expeditious and profitable handling of its grain; that the payment to

Peavey & Co. for the service in nowise affected the freight rates, deprived competitors of the Union Pacific of no business, and was not reflected in prices paid for grain at points of origin; and that one and one-quarter cents per hundred pounds was a reasonable and just compensation therefor, and that the road being entitled to perform said services itself, or have others do so, had perfect right to hire Peavey & Co. No clearer statement of facts or stronger brief could be written for the prevailing parties than is found in this opinion (10 I. C. C., 309; Rec. No. 286, 287; exhibit 1 to bill therein, pp. 13-25). In its report to Congress in 1905 the Commission, having been impressed with the argument that these services were but incidents to, as distinguished from, interstate commerce, and, therefore, not within the provisions of the Interstate Commerce act, made a strong appeal to Congress to include same therein. In its annual report for 1905, and orally (19 Senate, Doc. 243, p. 2911) it urged before the Congressional Committee that the law be so amended. Congress responded to this forcible request by passing the amendment of June 29, 1906 (34 Stat. L., 584), making interstate "transportation" include "elevation" *and* "transfer-in-transit," *requiring the carrier to furnish same* upon reasonable request, and *giving shippers the right to render same*, but permitting the Commission, after hearing on complaint, to determine the reasonableness of the payments made for the performance thereof. In the light of the previous investigations it is apparent that Congress desired this amendment to be applicable to the various situations hereinbefore explained, and to permit those furnishing services to carriers to be paid reasonable compensation therefor. In fact, the law was made to meet this situation and to legalize the services at the great grain markets upon the Missouri river.

In July, 1906, after the passage of this amendatory law and upon the petition of still another rival carrier of the Union Pacific, the Commission, without a hearing, summarily ordered the former

case involving the arrangement between the Union Pacific and Peavey & Co. reopened for further evidence and argument. A hearing was had, additional evidence was offered and further oral and printed arguments made and submitted, and upon April 9, 1907, an opinion was rendered by Commissioner Harlan (12 I. C. C. 85, Rec. No. 286, 287, exhibit 2 to bill, pp. 25-30), and an order entered that, under the law as amended, it was the duty of the carrier to furnish these services, which duty could be performed by paying the shipper for the rendition thereof, but that the payment of one and one-quarter cents per hundred pounds was in excess of the actual cost, and to the extent of the excess should be treated as unlawful. The payment was consequently reduced to three-quarters of a cent per hundred pounds. The Union Pacific and Peavey & Co. acquiesced in this decision, although the law is that the *value* of a service is not limited to its cost. The other railways serving these Missouri river markets amended their tariffs accordingly, so as to fix the price at this sum.

It appeared from the very first that Peavey & Co were grain dealers as well as elevator operators, and while transferring the grain through their elevators, it was also cleaned, clipped and mixed, thus enhancing its value. These are not transportation services, and to the contention that the payment for transferring thus became a rebate as being *pro tanto* a payment for purely commercial services, Commissioner Harlan (12 I. C. C. 101, Rec., No. 286, 287, p. 27), emphasized like views theretofore expressed by Chairman Knapp (Rec. No. 286, 287, p. 22; 12 I. C. C. 101) in this way:

> "Elevation, as commonly understood among elevator men and among buyers and sellers of grain, signifies the unloading of grain from cars, or from grain carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days. The 'treatment,' or grading, cleaning and clipping of grain, is not properly a part of 'elevation,' as the word is strictly used, and the retention of grain in an

elevator beyond the period of ten days becomes storage, and is not elevation. It is in this sense that the word is used in the amended statute."

Thus, the Commission ruled that the statute did not change the views theretofore held by the public and expressed by it that these commercial services were not a part of "elevation," and, therefore, the payments for the transferring service were not compensation for them.

Thereafter, upon April 14, 1908, the Commission, without notice to, or knowledge of, Peavey & Co., or the Union Pacific, entered an order for the second time reopening the case, for further argument upon this last point. Without any additional testimony upon which to base a finding, the Commission finally rendered a third opinion (14 I. C. C. 315, Rec. No. 286, 287, pp. 38, 39, exhibit 4 to the bill), and entered the order of June 29, 1908, (*id.*, 40), requiring the Union Pacific to cease and desist from paying to Peavey & Co. any sum for the elevation services. When this order was entered, Peavey & Co. demanded of the Union Pacific that it carry out and comply with its contract. This it refused to do, but finally agreed, with the consent of the Commission, to, and did, amend its tariff so as to provide for the continuance of the payments, but to prohibit their actually being paid until a court should, after notice to and a hearing from the Commission, determine its liability. The bill (Rec. No. 286, 287, pp. 3-12) in the Peavey case was thereupon filed to recover, under this and former tariffs, the back payments from the Union Pacific, the amounts of which are not disputed, and to require that road to comply with its contract and to set aside and annul the order of June 29, 1908, and enjoin the Commission from enforcing same. The effective date of this order was, from time to time, extended to enable the case to reach final hearing, which was had, under the expediting act, before Circuit Judges Sanborn, Hook and Adams, and resulted upon an elaborate opinion of Judge Sanborn (Rec. No. 286, 287,

pp. 314-332) in a decree (*id.*, 305-306) for complainant, from which the appeal and cross appeal are prosecuted.

5. *General Facts in the Diffenbaugh Case.*

(a) In the Diffenbaugh case (No. 285) the Missouri river complainants were grain dealers seeking an injunction against another order of the Commission relative to the same subject matter. Some of them were commission men and did not operate elevators, others millers, while still others lessees, owners and operators of elevators were engaged in performing the elevating, transferring and weighing services for carriers, other than the Union Pacific. Some of said carriers had built elevators, and knowing their operation by other than experienced persons to be unsatisfactory, leased them to certain of said complainants; one line built elevators at three of the Missouri river cities and operated same, providing elevation services without expense to complainants. Most of the lines entered into arrangements, upon the faith of which many of the complainants invested large sums of money in erecting elevators for the purpose of performing the elevation and transferring services for said lines (Stipulation and Statement H. G. Wilson, Rec., No. 285, pp. 149, 151). The business of complainants, the development of the markets, and particularly the elevator arrangements, have been made, and the vast sums of money expended in pursuance thereof, in reliance upon the declarations contained in the railway tariffs that the performance of the services would be paid for, upon the various situations which require the carriers to provide elevator facilities for the expeditious and economical handling of their grain business, upon the several investigations of the Commission in which the arrangement between the Union Pacific and Peavey & Co. was declared to be lawful, legitimate and, in fact, necessary to the line named, and upon the history leading up to, and the subsequent passage of the law making these

services part of "transportation" and giving shippers the right to perform same for a reasonable compensation.

(b) The interest of these persons in the question is manifest. Markets have been built up and maintained upon the practice of having grain shipped to them from the fields, then unloaded into elevators, offered for sale and thereafter shipped out to the purchaser at the balance of the through rate. The growth of business has been phenomenal. The Board of Trade of Kansas City was organized in 1869, and its first report was for the year 1871, when it showed a handling of 1,037,000 bushels of grain, and the growth of the business evidenced by its report for 1910 shows 67,072,000 bushels for the previous year. The flour milling business started in Kansas City back in the seventies, but was generally a local business, the first shipping records being in 1879. During that year Kansas City shipped a little over 62,000 barrels of flour. A like report shows the growth of this business to shipments amounting to approximately two and one-half million barrels in the year 1910. Records for Minneapolis, a milling center, have not been available back to the inception of the milling business in that city, but the records of that city for 1878 show that Minneapolis then shipped 940,785 barrels, as compared with 15,375,760 barrels shown by its report for 1910. Milling in transit is a privilege which has been granted and rests upon the general principle that grain may come from the fields to the market, there be milled and the product shipped out at the balance of a through rate. The practice is commendable and has successfully withstood judicial attack. (*Laurel Cotton Mills* v. *Gulf etc. R. Co.*, 84 Miss., 339, 37 So. Rep., 137.)

Stock yards near the center of breeding places of live animals show a similar result. From the pastures of the west animals are shipped to the markets in the center of the grain producing districts. They are there sold to feeders or shipped to other markets. In the latter case they go on at the balance of a through rate.

The reports of the Kansas City Stock Yards Company thus show the increase and growth of the business. It was organized in June, 1871, the first calendar year business being 1872. There were received thereat a total of 447,512 head of cattle, hogs and sheep. This business had grown to such proportions that during the year 1910 there were received there of these animals 6,433,881 head. These suggestions show the influence of the principle of transit arrangements in building up markets, because transit privileges apply to live stock and to grain products as well as to grain. For instance, at the Kansas City Stock Yards, the shipper has the privilege of trying the Kansas City market, and if not satisfied with it, he may forward his live stock on to some other market beyond Kansas City at the through rate from point of origin to destination, and while this specific rule does not apply to the milling trade, the same principle does, because either by the application of milling-in-transit arrangements or the application of proportional re-shipping rates, the principle of the through rate from point of shipment to the ultimate destination is observed, thus showing that the traffic received at these market centers is only traffic in transit.

(c) Late in 1907, complaints were filed with the Commission by the Traffic Bureau of The Merchants' Exchange of St. Louis against five railways whose lines extend from the producing section west of the Missouri River through these "primary" or "intermediate" markets, to St. Louis and other eastern markets, praying the Commission to order said railways, in effect to cease and desist from making payments of anything to elevators at said "primary" or "intermediate" markets. The complaints (Rec., No. 285, Ex. 1, pp. 17-21) clearly showed that the Missouri river complainants herein and the lines terminating at the Missouri river were vitally interested and bound to be affected by any conclusion of the Commission. They also, in the light of the history of the Peavey case and of the congressional investigation, showed that

the defendants were vitally interested in having the Commission grant the relief asked. The subsequent proceedings and hearing were had with defendants' officers for witnesses (Rec., No. 285, pp. 228, 230, 231, 233, 234, 236) and the orders issued without notice to or knowledge of the Missouri river terminal lines or shippers. On June 29, 1908, the same date as the order in the Peavey case, the Commission rendered its decision, and solemnly declared that there could be no payment for the transfer and elevation of grain at the Missouri river cities (14 I. C. C., 317, Exhibit 5, Answer of Commission, Rec., No. 285, pp. 120-138). Thereafter, upon September 26, 1908, the Missouri river complainants filed with the Commission, by its leave, a petition to reopen the case and grant them a hearing. This petition was denied (*id.*, pp. 54-56) and in its decision the Commission not only confirmed its former orders against the defendant carriers, but also undertook (*id.*, p. 23) to coerce all other carriers to cease and desist from paying for the services, by saying that the principle of the decision applied everywhere. The bill in the Diffenbaugh case (No. 285, pp. 2-17) was thereupon filed to set aside and annul these orders of the Commission which with that in the Peavey case became effective upon a common date. After the filing of the bills in the Peavey and Diffenbaugh cases, counsel agreed to try both together, and stipulations (Rec., No. 285, pp. 149-151, 152, 153; Rec., 286, 287, pp. 181, 183) were entered into to submit the issues upon the evidence introduced before, and the orders and opinions of, the Commission in both cases. In the Peavey case, as a basis of recovery against the Union Pacific, a copy of the written contract with the Union Pacific was included, as was also a statement of Frank T. Heffelfinger, of Peavey & Co., showing that demand had been made on the said road to carry out its contract, and an itemized statement of accounts due thereunder. In the Diffenbaugh case, a statement of H. G. Wilson, of the Transportation Bureau of Kansas City, was included showing the amount

of the grain business, as well as the capital invested in elevators at Missouri river cities; also the reasons for the indispensibility of the elevators to the carrier. The two cases were submitted together and Judge Sanborn's opinion (Rec., No. 285, pp. 277-296; No. 286, 287, pp. 314-332) applied to both, resulting in the decree for complainant (Rec., No. 285, pp. 283-276) in the Diffenbaugh case, from which the appeal is being prosecuted.

6. *Questions involved.*

The question involved is whether a railroad carrier can contract with the owner of an elevator, at a natural transfer point and public market place, to elevate and transfer grain, paying him therefor the reasonable value of his services. This question must not be confused with the demand of every producer with a granary or small elevator which is nothing more than a granary, that he shall be allowed for the service of putting the grain therein and thereafter loading into a railroad car. The question is practical. It deals, as Congress intended it should, with grain which has started in interstate transportation and reaches natural termini and public market places. It is, whether at such places and under such conditions, the market shall be encouraged or throttled, whether equipment shall there be released so that grain shall, without delay, be transported from the fields and brought to these markets so that the public may have the benefit of making its purchases at the earliest practicable date.

7. *The record summarized.*

In order that the concrete cases may be thoroughly understood, it is necessary to summarize the exact proceedings had below in each of the two cases.

8. *Summary of the record in the Peavey case (Nos. 286, 287).*

(a) The bill (pp. 3-12) succinctly states the facts which are practically admitted by the answers of the Union Pacific (pp. 57-60) and of the Commission (pp. 61-98). A cross bill (pp. 113-125) was filed by the Union Pacific asking to be relieved from the Peavey contract, if the order of the Commission was upheld, practically admitting, however, that the contract was fair, just and should be sustained.

(b) The bill had attached as Exhibit 1 (pp. 12-25) the first opinion of the Commission by Chairman Knapp (10 I. C. C. 309); as Exhibit 2 (pp. 25-35), the second opinion by Commissioner Harlan upon a reopening of the case (12 I. C. C. 85); as Exhibit 3 (pp. 35-37) a supplemental opinion by Commissioner Harlan and an order for a further argument; as Exhibit 4 (pp. 38-40) the opinion (14 I. C. C. 315), and order upon such rehearing; as Exhibit 5 (pp. 41-54) the second opinion (14 I. C. C. 510) in the St. Louis case, made the subject of complaint in the Diffenbaugh case (No. 285); and as Exhibits 6 and 7 (p. 55) the unpaid bills of the Union Pacific for elevation services, admitted (Stipulation, p. 182; answer, p. 60) to be correct, due and wholly unpaid.

(c) The answer of the Commission (pp. 61-98) disputed none of the ultimate facts, admitted the correctness of Exhibits 1-5, took no issue with any fact found by the Commission, and stated by Chairman Knapp, but produced as Exhibit 1-5 (pp. 103-111) orders extending, in order to avoid a hearing upon an application for a temporary injunction, the effective date of the orders complained of.

(d) The answer (pp. 57-60) and the cross bill (pp. 113-125) of the Union Pacific, put in issue by the other pleadings

(Stipulation, p. 164), admitted the allegations of the bill and the correctness of the exhibits filed therewith. The cross bill presented as Exhibits A (pp. 126-131) and B (pp. 131-132) C, D, E, F and G (p. 132, not printed), opinions and orders of the Commission appearing as exhibits to the pleadings of the other parties; H (p. 133) and I (pp. 133, 134) orders of the Commission extending the effective date of the order; J (pp. 134-139) and K (pp. 139-141) contracts between the Union Pacific and Trans-Mississippi Grain Co. (not connected with Peavey & Co) for performance of like elevation service for grain going into the elevator of that company at Council Bluffs, Iowa; L (pp. 141-142), M (pp. 142-143), N (pp. 143-144), O (pp. 144-145) and P (pp. 146-147) the tariffs in force filed with the Commission showing the amounts paid for elevations; and R (pp. 147-164) the opinion and order of the Commission giving reparation to certain shippers because of alleged discrimination by virtue of the contract with Peavey. With the latter these appellees have no concern further than to say if the claimants had elevators at Missouri river points, where markets were established, they were entitled to and had accorded to them every privilege that Peavey & Co. had. If they claim that out in the grain fields they were entitled to perform and be paid for like service, regardless of the terminus of the railroad or the existence of a market place, they were not within the spirit of congressional legislation.

(e) The evidence consisted of two stipulations (p. 165, pp. 181-183) with the documents produced thereunder consisting of:

1st. Part of evidence (pp. 166-179) in *haec verba* taken by the Commission in the proceedings resulting in the order the subject of controversy in case No. 285;

2d. The affidavit (pp. 179-180) of C. J. Lane as to the claims for reparation by other shippers;

3d. All the evidence (pp. 185-287), reduced by counsel to

narrative form, taken upon the hearings before the Commission resulting in the orders made the subject of litigation in both the Peavey and Diffenbaugh cases;

4th. The contract between Peavey and the Union Pacific and the various orders and opinions of the Commission, copies of which appear as exhibits to the pleadings;

5th. Statement (p. 182) of Frank T. Heffelfinger of Peavey & Co. as to the correctness of Peavey's bill against the Union Pacific;

6th. Tariffs of some of the other railroads (pp. 289-304) showing how payment was to be made for elevation services.

9. *Summary of Record in Diffenbaugh case, No.* 285.

(a) The bill succinctly states the facts (pp. 2-17) which are practically admitted by the answer (pp. 29-77) of the Commission. There are attached to the bill Exhibits 1 (p. 17-21), 2 (pp. 21-22) and 3 (p. 23) consisting of the opinions and orders of the Commission forbidding payments for elevation services by certain lines at Missouri river points other than the Union Pacific.

(b) The answer (pp. 29-77) put in issue no material fact. It outlined the entire history of the elevation service question, together with a history of the Peavey case, producing as Exhibits 1-4 (pp. 81-119) thereto, the opinions and orders in that case, and as Exhibits 5-9 (pp. 120-149) the orders and opinions in the St. Louis case, made the subject of complaint in the Diffenbaugh case.

(c) The intervening petitions of the Wabash (pp. 243-247), Chicago Great Western (pp. 247-250), Chicago & Alton (pp. 251-253) and Chicago, Milwaukee & St. Paul (pp. 254-257) Railway Companies were presented, each averring that the intervenor was

the owner of a railroad having its terminus at the Missouri river and was interested in the question involved. Each asked and was permitted (Opinion, p. 285; decree, p. 272) to be heard upon the evidence taken by the other parties.

(d) The evidence consisted (p. 149) of all the orders and opinions in both cases and the evidence, reduced by counsel, to narrative form (pp. 153-241) taken before the Commission, the statement of H. G. Wilson (pp. 149-150) and certain tariff sheets (pp. 258-271) of certain railroads, other than the Union Pacific, as to payment for elevation services.

ARGUMENT.

I.

The opinions of Chairman Knapp and Commissioner Harlan and of Judge Sanborn Below.

(a) The opinion of Chairman Knapp (10 I. C. C. 309; Rec., Nos. 286, 287, Ex. 1 to Bill, pp. 12-24) was rendered June 25, 1904, prior to any legislation upon the subject of elevating and transferring grain. It completely covers every phase of the case which could be safely rested thereon. Every averment of the Peavey bill (No. 286, 287, pp. 3-12) is sustained by the facts there found. The evidence upon which these findings were based here appears reduced to narrative form (Rec. Nos. 286, 287, pp. 189-209; Rec. 285, pp. 154-172). The Peavey contract was upheld as made openly, not secretly, and in good faith; 1¼ cents per hundred as an elevation and transfer charge was found to be reasonable, the service one necessary at a large market place located at the terminus of a great railroad, and the view adopted that the payments made did not operate as rebates or discriminations.

(b) Thereafter Congress by the act of June 29, 1906, (34 Stat. L., 584) made the service one to be performed by the railroad, required the amount to be paid therefor to be made part of the tariff, authorized the service to be performed by the shipper, and provided that the Commission could determine its reasonableness and at any time fix the charge to be made. Thereupon, being empowered to fix the rate, the Commission made a second investigation. The evidence then taken also here appears. (Rec., No. 285, pp. 173-227; Rec. Nos. 286, 287, pp. 209-286) also reduced to narrative form. There was no new substantial fact developed

(12 I. C. C., 316; Rec. 286, 287, opinion, p. 26) except this: Chairman Knapp had said in answer to the contention of a monopoly that "Peavey & Company handle some sixty per cent of the grain shipped from Union Pacific stations." At the second hearing the proof (Rec., No. 285, p. 213; Rec., Nos. 286, 287, p. 253) strengthened his view by distinctly showing that Peavey & Co. owned but 1/12 of the elevators in Nebraska, and though it had upon the Union Pacific alone 46.6% of the facilities for handling the grain, it only secured 38.59% of the business. Commissioner Harlan delivered an opinion (12 I. C. C., 85; Rec., Nos. 286, 287, pp. 26-28) upon April 9, 1907, restating, adopting and emphasizing the former opinion of Chairman Knapp save only in this: The statute having authorized the Commission to fix the rate, it was fixed at ¾ of a cent per hundred, the actual cost of the service, with no allowance whatsoever for any profit for fear that any profit would, to the extent thereof, be a rebate. In other respects the opinion was as strong in favor of payment for the service as that of Chairman Knapp.

(c) Still another rehearing was subsequently granted (Exhibit 3, Rec., No. 285, pp. 113-115; 14 I. C. C., 315) and upon June 29, 1908, Commissioner Harlan delivered an opinion (Rec., No. 285, pp. 116-118, 14 I. C. C., 315) upon which an order (*id.* 119) was made prohibiting any payment whatsoever to Peavey & Co. for the service. Upon the same day upon a complaint of a St. Louis Traffic Bureau against five through railroads only, Commissioner Prouty delivered an opinion (Rec., No. 285, pp. 120-139; 14 I. C. C., 317) upon which was entered an order (*id.*, 140) prohibiting a payment to any person for services of the same character at Missouri river points by the C. B. & Q., Mo. Pac., C. R. I. & P., St. L. & S. F. and M. K. & T. railroad companies. The complainants in the Diffenbaugh case (No. 285), and the Wabash Railroad Company, for the first time hearing of this decision

made application to be permitted to be heard therein because the order discontinuing the practice as to *some* of the several railroads doing business at Missouri river points was wrong in principle and in any event would discriminate in favor of other markets at other railroad termini, and of practices with other railroads at Missouri river points. So impressed was the Commission with this application that it delivered another opinion (Rec., No. 285, pp. 23-24, 14 I. C. C., 551) through Commissioner Prouty. In denying relief, he said:

> "Our order in these cases runs only against points upon the Missouri river, and one ground most earnestly insisted upon by the petitioners is that to stop the granting of these allowances upon the Missouri river while they continued elsewhere would be to create a serious discrimination against that locality. This is self evident. A cardinal consideration in reaching our conclusion was the belief that in no way could discrimination and preference be prevented except by the complete prohibition of these payments and privileges. *The principle of our decision applies everywhere. We expect that the decision will be universally accepted by carriers.* It is incredible that in the midst of the present demand for an increase in freight rates that any railroad can be found which will insist upon a continuance of this practice, the only effect of which upon the railroad is to deplete its revenues and demoralize its rates. If, however, this turns out to be otherwise, the commission will proceed in the most expeditious manner to enforce its ruling. *If the payment of the elevator allowance and what amounts to the same thing, the granting of free elevation, can not be prohibited everywhere, then it ought not to be prohibited upon the Missouri river.* The effective date of our order will be deferred until January 1, 1909, in order that *all carriers throughout the country* may have reasonable opportunity to bring their tariffs and practices into conformity with our conclusions and orders in this matter."

This was practically a repeal by the Commission of a statute passed at its instance.

(d) Judge Sanborn, with the concurrence of Judges Hook and Adams, unqualifiedly repudiated (176 Fed. Rep., 409; Rec.,

No. 285, pp 277-296; Rec, Nos. 286, 287, pp. 314-332) this change of front. His opinion is so elaborate and thorough, so plainly states the facts and conclusions reached that it would impair its force to quote therefrom. Suffice it to say that it covers every feature of the controversy, and advances reasons answering every argument which can be made for a reversal here.

II.

The amended statute (34 Stat. L., 584) was intended, and does apply to, the situations herein explained, and the change of front by the Commission was inexcusable.

Judge Sanborn's opinion (176 Fed. Rep., 409; Rec., No. 285, pp. 277-296; Rec., Nos. 286, 287, pp. 314-332) fully deals with this particular question. That which will now be said simply supports the view which that learned judge expressed.

1. In *Platt* v. *Union Pacific R. Co.*, 99 U. S., 48, 60, 25 L. Ed., 424, 428, it was said:

> "All will concede that in construing the Act of 1862 we are to look at the state of things then existing, and, in the light then appearing, seek for the purposes and objects of Congress in using the language they did."

In *United States* v. *Union Pacific R. Co.*, 91 U. S., 72, 23, L. Ed., 224, 228, the court said:

> "But courts may, with propriety in construing a statute recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provisions in it."

(2) (a) Turning to the history leading up to the amendment to the commerce statute this is the result: As shown by the bills and admitted in the answers, no action was taken by the Commission in its first investigation of the Peavey contract. On the second investigation (May, 1903), the situation was gone into from every possible standpoint and the arrangement was, without the aid of a statute authorizing it, declared to be reasonable, lawful and necessary to the Union Pacific. The opinion of Chairman Knapp (10 I. C. C. 309; Rec. No. 286, 287, pp. 12-25), in June, 1904, found to be true every material fact up to date stated in the bill, found to be reasonable, the amount to be paid and that it was not a device to cover a rebate or concession. There was, however, one very important question urged *in limine* by counsel, but not referred to, much less answered, by the Commission. This was the jurisdiction of that body. It was, contended that these payments, being for services *incidental to*, as distinguished from, commerce itself, were not within the purview of the act to regulate commerce as it *then* stood, and hence beyond the power of the Commission.

(b) This was no trivial question, in view of the numerous decisions of the courts that, at least until Congress acted, *incidents* of commerce were not commerce. This was expressly held with reference to elevator services (*Munn* v. *Illinois*, 94 U. S., 113, 135; *Budd* v. *New York*, 143 U. S., 517, 545; *Brass* v. *North Dakota*, 153 U. S., 391, 401); buying, selling, feeding and watering livestock in interstate transit (*Hopkins* v. *U. S.*, 171 U. S., 578; *Anderson* v. *U. S.*, 171 U. S., 625; *Cotting* v. *K. C. Stock Yards Co.*, 82 Fed. Rep., 850, 852); inspection of live animals at the packing houses (*U. S.* v. *Boyer*, 85 Fed. Rep., 425); drayage and cartage (*Munn* v. *Illinois*, 94 U. S., 113; *Chicago, etc., R. Co.* v. *Becker*, 32 Fed Rep., 849, 854; *Kentucky, etc., Bridge Co.* v. *R. Co.*, 37 Fed. Rep., 567, 618; *Stone* v. *Detroit, etc., R. Co.*, 3 I. C. C. Rep., 60, 64; *Interstate Com. Com.* v. *Detroit, etc., R. Co.*,

57 Fed. Rep., 1005, 1017, 1018, 1019; 74 Fed. Rep., 803, 813, 814, 838, 840; 167 U. S., 633, 643, 645, 646); cab service (*People* v. *Knight*, 67 App. Div., 398, s. c., 73 N. Y. Sup., 790, 792; 171 N. Y., 354; s. c., 64 N. E. Rep., 152, 153; 193 U. S., 21); switching, bridge, union depot and terminal facilities and services (*Wisconsin, etc., R. Co.* v. *Jacobson*, 179 U. S., 227, 295; *Kentucky, etc., Bridge Co.* v. *R. Co.*, 37 Fed. Rep., 567, 618; *Chicago, etc., R. Co.* v. *Becker*, 32 Fed. Rep., 849, 853, 854; *State ex rel. Lamar* v. *Jacksonville Terminal Co.*, (Fla.), 27 S. Rep., 225, 234; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S., 150, 153, 154); wharfage, dockage canal and lockage charges (*Hopkins* v. *U. S.*, 171 U. S., 578; *Sands* v. *Manistee R. Imp. Co.*, 123 U. S., 288, 295; *Packet Co.* v. *Keokuk*, 95 U. S., 84, 85; *Lindsay, etc., Co.* v. *Mullen*, 176 U. S., 126, 146, 154); and insurance (*Paul* v. *Virginia*, 8 Wal., 168, 183; *Phila., etc., Co.* v. *New York*, 119 U. S., 110, 118; *Hooper* v. *California*, 155 U. S., 648, 653, 655).

(c) In its report to Congress in 1905, the Commission, having been impressed with the argument presented in the Peavey investigation that these services were but *incidents* to commerce and, therefore, not within the provisions of the act, made this appeal to have same covered by legislation (Peavey bill, p. 9; answer, p. 13; Diffenbaugh bill, p. 17; answer, p. 16):

> *"Terminal roads, elevator charges and private cars.*— There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division of a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or

less resorted to for the purpose of or with the effect of preferring one shipper to another. *It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that.* Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway, and without injury to the public, if provided by the shipper itself. *We do think, however, that the commission should be empowered in a case of this kind to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor.* Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

(d) In 1902 the Commission handed down an opinion in *"Consolidated Forwarding Co. et al.* v. *Southern Pacific Co. et al., Continental Fruit Express and Armour & Co., intervenors* (9 I. C. C., 182, 206e). This was an investigation of arrangements and contracts between the defendants and intervenors regarding charges and allowances for refrigeration and refrigerator cars. It appeared that the intervenors, the private car owners, were also extensively engaged in the fruit business in competition with complainant and other non-owners. On page 206e, the Commission observed:

"Complainants ask that the defendants be required to furnish their own equipment directly, and not by lease. This is urged as a remedy for the alleged abuses growing out of leasing cars from one of the shippers engaged in competition with the complainants. While it must be conceded that such an arrangement as that complained of and referred to in the findings to some extent affords opportunities for unfair advantages and to say the least, is naturally distasteful to other shippers who feel that their affairs are too much exposed to one

of their competitors, *still there is no authority in the law for the commission to make any order to the effect suggested. Carriers are left by the law to procure equipment for their business by lease as well as otherwise, and are not prohibited from leasing from a shipper.*"

In 1904 these arrangements were further investigated and the question of jurisdiction of the Commission squarely presented, (10 I. C. C., 590). On page 615 the Commission stated:

"Much has been said in the argument of this case upon the question whether the commission has jurisdiction of the refrigeration charges."

In the same year (1904) the Commission investigated another of these arrangements, (*In re Charges for the Transportation and Refrigeration of Fruit from Points on the Pere Marquette and Michigan Central Railroads,* 10 I. C. C., 360). Again the Armour Car Lines were interested, again the alleged advantages to such shippers as compared with non-owners of railroad facilities were publicly laid bare, and again the question of jurisdiction was raised. On page 373 the Commission said:

"We think that it is the duty of the respondent railroad companies to furnish refrigerator cars for the transportation of this fruit. * * * *But this duty does not spring from the act to regulate commerce, nor has this commission any jurisdiction of that matter.*"

Again, page 364:

"Granting, however, that there is no liability resting upon a common carrier to provide refrigeration, this must be clear that *the railway must either furnish ice itself for a reasonable price or permit the shipper to do so.* * * * *By* making these exclusive contracts the defendant railways in effect impose upon the shippers of such fruit exorbitant charges for the transportation of their product to market, and we think they thereby violate the first section of the Act. * * *

While, however, we are of the opinion that a wrong exists here, it is doubtful what remedy this commission can or should apply. It is possible that an order to cease and desist from these exclusive contracts *so long as the rates for refrigeration are exorbitant, might be enforceable.*"

Again on pages 376, 377:

"It seems proper to state that two phases of this matter were called to the attention of the commission upon the hearing which have not been referred to in this report.

First. It appears that the Armour Car Lines Co.—and that is Armour & Co.—already has a practical monopoly of the fruit carrying business under refrigeration from Michigan. We know from former investigations that this is also true in some other sections of the country; and that this monopoly may finally become general. *All this is a matter of no concern to the public so long as the service is good and the charge reasonable;* but the establishment of a general monopoly might result in poor service *just as it has in this section already resulted in exorbitant charges. For this reason it is urged that the Railway Companies ought not be permitted to make exclusive contracts with private car lines like those under consideration, but should be compelled to provide their own equipment.*" * * *

Second. It was said Armour & Company are extensive dealers in fruits and vegetables, and that the control of the cars in which and of the charge at which these articles must be transported might work to the serious disadvantage of competitors" etc.

In the same annual report of the Commission (1905) which carried the appeal for an amendment regarding elevation payments, a specific request was made for express authority to make orders relative to these refrigeration charges.

(e) Without legislation the power existed for the railroad company to pay for the service rendered by the elevator operator. This proposition was unanswerably put by Chairman Knapp (10 I. C. C. 309; Nos. 286, 287, pp. 12-25) upon the first hearing. It was clearly decided in *Richmond* v. *Dubuque & Sioux City R. Co.*, 26 Iowa, 191, 200, 201, where it was said:

"We are now prepared to state succinctly the construction to be given the whole contract. The plaintiffs are entitled to handle in their elevators all grain coming over defendant's railroad whether in its own cars or the cars of the Dubuque Southwestern Railroad or any other connecting road primarily shipped for points beyond or other than Dubuque and to have therefor the price stipulated from the defendants. * * * But it is argued by defendant's counsel that this construction of the contract will render it void by reason of being one thus construed in contravention of sound public policy; that public policy as also the law maintaining and enforcing it abhors a monopoly; and that the construction as above set forth gives to the elevator a monopoly of handling all the through grain brought on the road of defendants. Without deciding what the law is upon the question of monopoly, suppose it to be conceded as claimed, what then? The defendants as common carriers of grain over their line of road were bound to unload it from their cars when they reach the terminus of the line on the bank of the river which there forms a barrier to their being run further. To unload the grain with ordinary shovels and manual labor was necessarily tedious, expensive and wasteful. The manner or means of discharging the grain was legitimately and properly within the discretion of the carrier, and the shipper or consignor could not rightfully control the carrier in that particular (provided no prejudice resulted to him) any more than he could control as to the structure of the steam engine or the fuel to be used in the hauling of the cars over the road. While the consignor has most unquestionably the right to direct and control as to which of the two or more connecting lines shall receive his consignments, yet that is a very different question from controlling the manner in which the carrier shall perform his undertaking. And if the carrier shall make his contract with one laborer or with a certain number of laborers whereby in consideration of having the unloading of all grain he or they will do it at a certain price, such contract could hardly be called the giving of a monopoly. Whether the employe be one or many laborers, or *be the proprietors of an elevator* can make no difference upon the question of monopoly. But further than this the power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power. And like the power to declare a statute unconstitutional should be exercised only in cases free from doubt. The fact that by reason of the development of the country, or a great improvement of the

means of transit, or other causes, a contract becomes a hard or profitless one will not justify a court in absolving either party from its performance. Courts simply declare and enforce the law as applied to the contract of the parties; they do not grant indulgences or absolve from valid obligations."

In *People* v. *Budd,* 117 N. Y., 1, 22 N. E. Rep., 670, 677-678, it was by Judge Adams said:

"A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the sea board at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensible instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargo of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects."

When the case reached here (*Budd* v. *New York,* 143 U. S., 517, 534) Mr. Justice Blatchford said:

"We regard these views, which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

At page 544 he said:

"On the testimony in the cases before us the business of elevating grain is a business charged with a public interest and those who carry it on occupy a relation to the community

analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the City of New York and other places on the seaboard would without the use of elevators be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner who engages in the business to a use in which the public has an interest and he must submit to be controlled by public legislation for the common good."

(f) In the light of the foregoing, the appeal to congress, the hearing before its committee, and the legislation which followed are matters of some moment, for these various payments for elevation and transfer charges, their nature and effect, were thoroughly discussed before the congressional committees appointed to take testimony looking to an amendment to the law. Witness after witness testified that the payments were, for the most part, paid to the owner of the goods, thus reviewing the questions repeatedly raised in the hearings before the Commission, and which subsequently divided that body, i. e. the possibility of such payments being considered rebates and the alleged unfairness and unlawfulness of arrangements which allow shippers to perform any service for carriers in connection with their own goods, whereby discrimination would exist. The inquiry was particularly searching regarding these elevator services and payments therefor (Evidence of A. B. Stickney, Senate Documents 243, Vol. 18, p. 2123; A. C. Bird, *id.*, p. 2277; also Commissioner Prouty, Senate Document 243, Vol. 19, p. 2911). Thus, A. B. Stickney (Senate Document, Vol. 18, p. 2123) upon May 6, 1908, urging that the payment was illegal, testified:

"Hence since the injunctions the traffic directors have stopped paying rebates on grain shipments, but in lieu thereof have paid elevator fees, a practice which the Interstate Commerce Commission has sanctioned as admissible under the law, notwithstanding it is evidently a rebate paid to elevator owners which is not available to ordinary shippers."

A. C. Bird, a railroad traffic manager, testified for the through lines and had a colloquy with Senators Cullom and Newlands thus (Senate Documents, Vol. 18, p. 2277) reported:

"Mr. Bird: Now the modern method of handling grain is this: You take all the great traffic lines, or agricultural lines, such as the St. Louis, Northwestern, Missouri Pacific, the Rock Island and the Burlington and all to the western extremity of the grain producing district and instead of hauling that grain into the closest market and letting it be subject to a commission, a rake-off, there, and then be forwarded to the next market and be subject to another commission there, they have adopted and instituted a system—the public, not the railroads, have done this—have what I call line buyers. A man of sufficient means or credit goes out on the Burlington or Union Pacific and those great grain producing roads, and starts a line of little country elevators, having a capacity of ten or fifteen thousand bushels, and he buys from the farmer. He has his elevator at the eastern portion of the territory and he buys his grain and sells it direct to the foreign consumer and he does not pay one cent of tribute from the time he takes it from the farmer's wagon until he delivers it to the consumer. He pays no tribute except the cost of transportation. He has his own elevators, and where they are necessary he has accumulating elevators or concentrating houses, and in many cases he has his own ships. This man goes to Chicago and for instance, down the lakes and the St. Lawrence River or by water to Buffalo and by canal before it goes by rail, or it goes out by New Orleans and the commission merchant as such is wiped off the slate; he is practically gone; his occupation gone. It is that class of men that make these complaints. It is hard on the commission merchant who has his rights. But shall we change the existing status of things merely so that he may take his profit as a middleman out of that business?

Senator Cullom: He buys the grain and markets what he can out of it?

Mr. Bird: No; the commission merchant, as a rule, does not buy grain. He receives it on consignment to be sold to the best advantage.

Senator Cullom: This man that goes out on the various lines of road buys the grain?

Mr. Bird: They are the line-men and they buy the grain from the farmer and send it straight to the consumer.

Senator Newlands: The commission merchant is going out of business?

Mr. Bird: He is being pushed out.

Senator Newlands: Which way of administering that business is best for the farmer?

Mr. Bird: The way that attaches the least cost to the handling of grain.

Senator Newlands: And that is what?

Mr. Bird: That is by having no middleman, no intermediary. That is the way, in order to get the greatest return.

Senator Newlands: Is there no such system as enables these men who hold these local elevators at different places to practically control the price of wheat?

Mr. Bird: No more than the control which goes by legitimate investment; no more than the control which enables the man who owns a big packing house to kill a great many more hogs at a cheaper rate per hog than the man having a small consignment to handle."

In a colloquy (Senate Document, Vol. 19, p. 2911) between Commissioner Prouty and Senator Newlands, this occurred:

"Commissioner Prouty: I think that the payment of rebates as such practically ceased when the Elkins Bill went into effect and it is only resumed in aggravated instances where apparently there could not be anything else done. For example, there are certain lines which handle grain from the Missouri River to Chicago and the East. Those lines have buyers on their roads which own elevators at terminal points. They allow an elevator charge to their buyers. Certain other lines which have no elevators so that they are unable to make the allowance for an elevator charge to their buyers, I think, have at times been compelled to pay a rebate which amounted to that elevator charge.

Senator Newlands: Or lose the business?

Commissioner Prouty: Or lose the business. That is an example of what I mean. I could not produce any evidence on that. * * * If you want to stop the payment of rebates, Senator, in my judgment you have got to provide certain things. In the first place you have got to take care of the terminal railroad. You have got to take care of the private car lines, although that is very much overdrawn just at the present time. There is not as much to this private car line as the newspapers and magazines talk. *You have got to take care of the elevators, you have got to do that.*"

(3) On June 29, 1906, the law (34 Stat. L. 584) was amended precisely as requested by the Commission by supplementing section 1, making interstate "transportation" *include "elevation and transfer in transit," and "refrigeration or icing,"* by this provision:

"And the term 'transportation' shall include cars * * * and all services in connection with the receipt, delivery, *elevation and transfer in transit, ventilation, refrigeration or icing,* storage and handling of property transported, *and it shall be the duty of every carrier, subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor.* * * *"

Section 6 was amended so as to require the carrier, in its published tariffs, to separately state "all terminal, * * * storage and icing charges, and all other charges * * * all privileges and facilities granted * * *".

These two amendments were directed to the contention which had been made in the Peavey and other cases that it was not the duty of the carrier to furnish these *incidental* services.

Congress then met the case of one who was a shipper furnishing the facility, by amending section 15, so as to give *the shipper the right to furnish the facility, thus providing therefor*:

"If the owner of property, transported under this act directly or indirectly renders any service connected with such

transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission, may after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order *which order shall have the same* force and *effect,* and be enforced in like manner as the orders above provided for in this section."

(4) (a) These amendments, and the history leading up to the enactment thereof, can leave no doubt as to the purpose of Congress. Although aware of the attacks on arrangements between carriers and shippers who furnished transportation facilities in the shipment of their own goods, the Commission did not ask that Congress prohibit them. All it asked was the power and authority to determine the reasonableness of the payments made for the services. Congress responded to the request of the Commission in almost the same words in which it was made; indeed, it would seem possible that some commissioner actually penned the amendment, so closly does its language follow that of the recommendation. It should be borne in mind that the investigations of elevator payments made at these Missouri river cities constituted the sum total of the Commission's knowledge and experience upon that particular subject at the time of the appeal to Congress in 1905. The books show no decisions or reports of other elevator arrangements or complaints. The discussions before the senate committee referred to no other localities than those upon the Missouri river. What elevator arrangements, then, did the Commission have in mind when, in its appeal, it said regarding the suggestions that such arrangements be prohibited:

*"We should hesitate to recommend at this time so drastic a measure as that * * *. It would interfere with property rights which have grown up under the present system."*

What elevators did Commissioner Prouty, representing the Commission, refer to when he boldly said before the senate committee from whom he and his colleagues were looking for relief:

> *"You have got to take care of the elevators. You have got to do that."*

Missouri river elevators of course. The Peavey elevators in particular. It was the same as if Congress had specifically mentioned them in the amendment so manifestly apparent is the fact. Can the Commission repeal the law? After the express recommendation that these arrangements be protected, after the appeal "to take care" of them, after the enactment of the very legislation requested which, by its own terms, do "take care" of them, can the Commission turn around and pursue what its own report calls the "drastic measure" of prohibition? Rules of statutory construction and good faith respond in the negative. So the court below decreed.

The same recommendation as was made regarding the elevator payments was made with reference to the refrigeration charges and private car lines, and the subsequent legislation was passed to apply to all alike. Millions are invested in these various properties and arrangements, and Congress was aware of the fact when it amended the law. Granted that it has the constitutional power to do so, would that body intend or propose to destroy such valuable property rights without some kind of express language to that effect?

In *Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197, 211, this question is thus answered:

> "So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interefere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights

> of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, one of the principal objects of all systems of transportation. * * * As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce of value to the commerce carriers and the consumers within the United States. *Clearly express language must be used in the Act to justify such a supposition.*"

Again in *Detroit, G. H. & M. R. Co.* v. *Interstate Commerce Commission*, 74 Fed. Rep., 803, 823, the "cartage" case, the court said:

> "It may well be doubted if Congress had any intention, if it has the power, to deprive a carrier of such an appliance by imposing upon it the necessity of either abandoning it, or the establishment of similar appliances at all other places on its roads. * * * If Congress had knowledge, as we presume it had, of the existence of such an instrumentality among the appliances of railroad companies, *any intention to discontinue it should be made manifest by more direct language than we have in this act, and not dependent solely on implication to be drawn from it.*"

(b) That Congress intended to distinguish between and include both "elevation" and "transfer in transit" is also evident from the amendment itself. The proviso specifically reads "elevation, *and* transfer in transit." There is a comma after the word *elevation*, rendering absolutely clear that *elevation* is one thing and *transfer in transit* another. The conjunction *and* denotes addition. Again, if it had been intended to use convertible terms, the conjunction *or* would have been used as was done elsewhere in the same proviso, viz., "refrigeration *or* icing." Clearly Congress appreciated the difference between "elevation" and "transfer in transit," so was careful to include both by using the word *and*, and placing a *comma* between them. Just as clearly was the similarity and sameness between "refrigeration" and "icing," appreciated so the conjunction *or* was used.

As said in *Platt* v. *Union Pacific R. Co.*, 99 U. S., 60:

> "Congress is not presumed to have used words for no purpose. * * * Courts are to accord a meaning, if possible, to every word in a statute. It is the duty of the court to give effect, *if possible*, to *every* clause and *word* of a statute, avoiding if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."

It is very plain that Congress intended to take care of the Missouri river elevator arrangements whether the service for which the payments were made was called "elevation" which might be performed at the terminus of a shipment, or "transfer in transit" which contemplates a service at a great grain market and is ascertainable from its name.

(c) The amended statute was scarcely passed before the Peavey arrangement was, for some unknown reason, again ordered reopened for further hearing. In July, 1906, less than a month after Congress had given what the Commission asked, i. e.: the power to determine the reasonableness of the Peavey payments, so as to prevent the use of service as a device for a rebate the *third* investigation was begun, and in less than a year (April 9, 1907), *another* opinion was handed down, in which the first construction of the new law was made. Being the first investigation after the new law was passed and so close on the heels of the legislation, great significance should be attached to it.

Commissioner Harlan (12 I. C. C., 85; Rec., Nos. 286, 287, p. 27), thus defined "elevation":

> "Elevation * * * signifies the unloading of grain from cars, or from grain-carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days * * * It is in this sense that the word is used in the amended statute."

This definition says nothing about a "transfer in transit" showing that the Commission understood the purpose of Congress to be to protect the Peavey and other Missouri River arrangements, if later, the theory that grain consigned to these intermediate markets was not technically in transit was sustained. In fact the opinion expressly said:

> "We see no warrant in law or holding, as is suggested, that such elevation can not be provided at destination and is lawful only for the transfer of grain in transit."

And again:

> "By whatever name it may be called, the service actually rendered is in fact elevation and may be so regarded under the amended act."

The Commission further held that the "treatment" or grading, cleaning and clipping of grain was not properly a part of "elevation" as the word is used, thus condemning the schemes and devices of other parties not similarly situated, to be paid for a non-transportation service. The "treatment" of grain is not transportation. By the Commission's words the payment is not made for the "treatment" but for the "elevation" of grain. If the elevator man gets some incidental benefit, that is of no concern to the railroad or the public, much less the Commission. Congress gave to the shipper the right to perform the service. This service having been declared within the statute, the Commission then proceeded to again approve the arrangement commonly entered into to secure its performance. The only departure from the former opinion was as to the amount of the payment, which was limited to the *cost* of the service, not reasonable value. This was an error made in the anxiety to prevent the use of the service as a device. How the *cost* of the service approximates a reasonable

value is not understood. A reasonable rate comprehends something more than cost, i. e., some profit. So the law now is. (*Southern R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S., 297). The holding was by Commissioner Harlan stated to be on the ground that the amendment must be "read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust 'discrimination.'" This ignores the thought that while a preference and discrimination might exist the effect is not *undue* as being "under substantially different circumstances and conditions," and was authorized by the very law which denounced the discrimination. It could not, therefore, in any event, have been the kind of a discrimination intended to be prohibited.

III.

The practice of paying for services in elevating and transferring grain does not make an illegal discrimination.

This question is also fully considered by Chairman Knapp and Judge Sanborn in their opinions. In addition thereto, some observations will now be made.

1. A discrimination is forbidden by the Interstate Commerce Act. That which is expressly allowed thereby cannot be an *undue* or *illegal* discrimination. Such only are forbidden.

In *Interstate Com. Com.* v. *B. & O. R. Co.*, 145 U. S., 276, 277, Mr. Justice Brown said:

> "It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust*

or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh, but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by Section 2 to make an unjust discrimination. *Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."*

Again at page 283:

"In short, the substance of all of these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, *and that any fact which produces an inequality of condition and a change of circumstance justifies an inequality of charge."*

In *Interstate Commerce Commission* v. *B. & O.* R. Co., 43 Fed. Rep., 37, 50, 51, Mr. Justice Jackson, then Circuit Judge, said:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage, persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services? In *Nicholson* v. *Railway Co.*, 1 Nev. & McN., 147, which involved the 'undue preference' clause of the act of 1854, Erle, C. J., said: 'I take the free power of making contracts to be essential for making commercial

profit. Railway companies have that power as freely as any merchant, subject only as to this court, to the duty of acting impartially without respect of persons; *and this duty is performed when the offer of the contract is made to all who wish to adopt it.* Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district; *but the power of the railway company to contract is not restricted by these considerations.'* "

At page 53, he gave these further references to English cases:

"In *Bellsdyke Coal Co.* v. *North British Ry. Co.*, 2 Nev. & McN., 105-110, it was said by the court that 'a railway company pays no more than a due regard to its own interests if it charges for its services in proportion to their necessary cost, *and has only such variation in its rates as there is in the circumstances of its customers.*' In *Baxendale* v. *Railway Co.* (leading case), 5 C. B. (N. S.), 336, 28 Law J. C. P., 81, Cockburn, C. J., after stating that if it were made to appear that the disproportion (in rates) was not justified by the circumstances of the traffic the court would interfere, proceeds as follows: 'So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, *provided the same advantages were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition.*' And, while recognizing the duty on the part of the court to redress any injustice or inequality prohibited by the law, he makes the further pertinent observation: 'At the same time we must carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary right (subject to the above-named qualifications) which a railway company, in common with every other company or individual, possesses, of regulating and managing its own affairs, either with regard to charge or accommodation as to the agreements and bargains it may make in its particular business.' "

In *Interstate Commerce Commission* v. *B. & O. R. R.*, 145 U. S., 263, 264, it was said:

"So far as Congress, in the act to regulate commerce adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language, and intended to incorporate it in the statute."

2. Elevation is a service of transportation. In section 15 of the Interstate Commerce Act as amended, Congress specifically recognized the right of the owner of property to furnish any service connected with transportation, subject to the power of the Commission to determine the reasonable maximum charge to be paid by the carrier for the service so rendered. The question of the *right* of the owner of grain to furnish such a transportation service, as elevation, is not one for the commission to determine. Congress had already by statutory enactment determined that question. The Commission was concerned (*a*) as to the reasonableness of the charge which the carrier paid to the owner of the grain for performing for it such service, and (*b*) as to whether such allowance was excessive to the extent that section 2 and 3 of the act to regulate commerce were violated. Congress, in response to the request of the Commission, put it beyond its power to hold that it was illegal for a carrier to pay the owner of grain a reasonable allowance for performing any elevator transportation service. It is the statutory right of the owner of grain to have reasonable compensation for the carrier for performing for it an elevator transportation service. The Commission cannot destroy this statutory right. Its duty is to prescribe rules and conditions under which this statutory right cannot be exercised so as to defeat the provisions of sections 2 and 3 of the Interstate Commerce Act. Inasmuch as the provisions of section 15 of the amended act was passed at the request of the Commission subsequent to the enactment of sections 2 and 3 thereof, it is clear that Congress did not intend that those two sections should be so construed as to destroy section 15. That section should be construed liberally, so as to give

it force and effect. If under the provisions of section 15 there arises a discrimination which is legal, then it is not unjust, and a preference or advantage that is not undue and unreasonable is no violation of sections 2 and 3. This probably answers the entire complaint of the commission.

3. The substance, not the shadow, should be considered. It matters not the form of the billing. The important matter is whether the tariff sheet correctly states the fact. Grain may be billed to one point, there milled and the product carried out upon the original through rate. This is called the milling in transit privilege and has been repeatedly upheld (*Laurel Cotton Mills* v. *Gulf, etc., R. Co.*, 84 Miss., 339, 37 So. Rep., 137; *Central Yellow Pine Ass'n* v. *Vicksburg, etc. R. Co.*, 10 I. C. C., 193.) Live stock is unloaded at market places, there offered for sale, and the balance left unsold goes on later upon the through rate.

So with Peavey's grain. If the form of the billing is not proper it can be changed. It has been in use for years, meeting the approval of connecting carriers and the Commission. The material point is the propriety of shipping grain to a Missouri river market, there unloading it into an elevator and then shipping out so much thereof as is not there consumed, upon the balance of the rate.

IV.

Alleged discriminations, upon account of which, the Commission forsook the statute, which it induced Congress to enact.

(1) In the opinion in the St. Louis case, three different forms of discrimination between persons were mentioned by the

Commission. No complaint came from any person doing business at these Missouri river cities, where the discriminations were alleged to exist; in fact the very persons whose interests was said by the Commission to be adversely affected, showed below, that no injustice or unfairness results and are here seeking to uphold an injunction against any interference with present conditions. Surely these Missouri river complainants (and the majority of them do not operate elevators), are better able than anyone else to judge what is best for their interests. What has been already said (*Supra*, Div. III) answers any claim of unjust discrimination. But in addition thereto and to the views expressed in the opinions of Chairman Knapp and Judge Sanborn, the arguments of the Commission will be answered. This at the expense of being tedious, it being almost impossible to intelligently consider the views of a body which were changed at every hearing.

(2 The first form of discrimination claimed was that arising out of the amount of the payment being more than the cost of the service rendered. This form, however, was eliminated when the payment was reduced from one and one-quarter cents, first found to be reasonable, to three-quarters of one cent per hundred pounds, which was found to be the actual cost, allowing nothing for profit.

The second form has to do with discrimination between elevators, but when the payments were extended to all elevators in a like situation, at the termini of railroads and at market places, this form was removed.

The third, and, in the view of the Commission, the remaining form, is explained as follows:

> (c) "A third discrimination still remains. While this termed a transfer charged upon the tariff and is only paid upon grain which actually moves out from Omaha, it is, in fact, under actual conditions, an elevator allowance, and is paid by the Union Pacific for the purpose of inducing the elevation of grain at Omaha. In other words, the Union

Pacific pays for the unloading of a carload of grain when discharged into an elevator and requires the consignee to pay for the unloading if that grain is unloaded by any other means. This is a clear discrimination in favor of the elevator against the consignee who does not employ the service of an elevator in the unloading of his grain."

The evidence warrants no such criticism. Had it done so the answer was plain.

It is argued that in paying the elevator, and not the consignee who unloads his grain "by other means," discrimination results. This discrimination, however, is not undue or unjust and, therefore, not unlawful because of the wide dissimilarity of results to the carrier. The "other means" is none other than the antiquated "shovel" method, which not only the undisputed and uncontradicted testimony of the railroad witnesses shows, but the report of the Commission in the first Peavey case also confirms, is totally inadequate, unsatisfactory and productive of congestion, delays and idle equipment, as well as loss of grain in its operation. Alongside of this "other means" is the modern elevator which the evidence, equally undisputed and uncontradicted, as well as the Commission and the courts, say is absolutely and indispensibly necessary to the carrier for the prompt release of equipment, consolidation of loads, transfer in transit and the securing of correct weights. But this is not all. The consignee who unloads his grain by these "other means" does not provide "other means" for ascertaining its weight, while his competitor who owns an elevator not only promptly unloads and transfers the grain, but also secures its exact weight by means of hopper scales *in the elevator*. The weighing service is a distinctive transportation service and, when performed in the elevator, saves the carrier the extra switching necessary to move the car to a track scale.

In view of the above, can it be seriously argued that it is unjust discrimination to prefer one service over the other?

(3) We insist that the act does not prohibit all discrimination. As said (14 I. C. C. 326) by the Commission, in the St Louis case:

> "Railways cannot be operated without more or less discrimination. The Act to Regulate Commerce does not attempt to prohibit all discriminations, but only that which is *undue.*"

To the same effect are the decisions of the courts. (*Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197.)

In the party rate case, (*Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U. S., 283), these words of Judge Jackson in the court below were quoted with approval:

> "To come within the inhibition of said section, the differences must be made under like conditions, that is, *there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions.*"

The essence of all the decisions is that the positions of the respective persons, between whom difference in treatment is made by the carriers, must be compared with each other; there must be found to exist substantial identity of situation (or, as to these cases, of service and benefit to the carrier) accompanied by irregularity and partiality of treatment by the carrier which results in *undue* advantage to one, or *undue* disadvantage to another, in order to constitute unjust discrimination. The totally different service brought to the carriers by the elevators and these "other means" unquestionably presents a situation entirely outside the prohibition of the statute.

The comparison, however, must not be confined to the positions and relations of the persons directly interested. As held in

Texas & Pacific R. Co. v. *Interstate Commerce Commission, supra,* the welfare of all, the carriers, the producers, the shippers, the consumers and the public should be kept in mind and given consideration. The general public benefits of elevators were by Mr. Ives, general traffic manager of the Wabash, (Rec., Nos. 286, 287, p. 226), thus summed up:

> "I think that if proper elevator facilities are furnished at nearby termini, as, for example, Omaha for Nebraska, and Kansas City for Kansas, the effect is beneficial to the community, to the farming and grain growing communities and to the railroads, because it enables the cars to do their maximum work. They can be handled promptly to the nearby termini, unloaded there, and then run back to the grain field. * * * The farmer gets the benefit of it because he gets a ready market and prompt payment for the grain. It is necessary for the preservation of markets to have ample storage, and if the payment of an elevator allowance is necessary, in order to encourage the building of elevators, it is a good thing, provided the allowance is paid indiscriminately to all parties owning elevators, for prompt release of equipment."

In the opinion in the St. Louis case, (14 I. C. C., 326) it was said:

> "Elevation facilities are absolutely essential to the proper handling of grain. There must be the country elevator and the terminal elevator; and it is for the interest of all parties—producer, carrier, and consumer—that these facilities shall be ample. In no other way can the farmer dispose of his product and obtain his money for it when he desires. In no other way can the railroad economically handle this grain from the producer to its final destination. In the interest of the general public, therefore, this construction of ample elevator capacity should be in all proper ways encouraged."

In the light of these public benefits we have on the one hand, the man who has invested thousands of dollars in an elevator with its facility for quick and economical transfer and prompt release

of equipment, with its hop or scales for the securing of correct weights, with its tendency to develop primary markets, with its manifold benefits to the producer, the shipper, the carrier, the consumer and the general public, all of which have inspired ecomiums from the carriers, the Commission and the courts. On the other hand, there is the man who has not invested a dollar in any facility, who performs no weighing service, who has the railroad switch his car to the specially constructed tracks for a "shovel" transfer, then switched again to the track scale for weighing, all of which results in congestion, delay and non-use of much needed equipment to the detriment of the shipping public. Any argument which says it is unjust and unfair to pay the one and not the other who does not, and cannot, give the service which the carriers must have, is wholly untenable. How many differences in situation must be cited before this discrimination can be proven outside the statute? Must every feature be different? The following declaration of the supreme court in the party rate case, *supra*, squarely answers this question:

> "In short, the substance of all these decisions is that railways are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that *any fact* which produces an inequality of condition and a change of circumstances justifies an inequality of charge."

Not one, but all the important features connected with these services warrant the discrimination made in favor of the elevators.

(4) Many of the differences herein relied upon as making "substantially different circumstances and conditions," have been discussed by the courts and held sufficient to bring the discrimination outside the statute.

In a case arising in Arkansas (*Harp* v. *Choctaw, Oklahoma & Gulf R. Co.*, 118 Fed. Rep., 169, 175), the defendant had refused to furnish cars to the complainant, the owner of a coal mine,

to be loaded by wagons into cars held on its own tracks, at a time when traffic was heavy, and its supply of cars consequently depleted; while at the same time, it furnished cars to other mine owners who had tracks of their own and loaded by tipple. After observing there was a difference in situation by reason of the wear and tear on defendant's tracks, the court said:

> "Moreover, in the very nature of things, cars could not be loaded as rapidly by wagons as by the tipple, and therefore the former involved, to some extent, delays in loading cars, which, in view of the inadequate supply, the road could ill afford. The conditions under which plaintiff was operating his mine were not, therefore, the same as those of the other mine operators. They were radically and essentially different. I do not think it reasonable to say the road was without authority to regulate its affairs in matters of that kind. To say that it has not, is to affirm that its whole commercial traffic is to be impeded, and its traveling public and its own employees and those of the coal companies loading cars in its yards by wagons, shall be subjected to increased dangers from accidents, in order to allow one man the privilege of doing what, manifestly, competent railroad management would condemn. I cannot conclude otherwise than that the action of the defendant company in thus denying the loading of cars on its tracks in its yards was not only legal and reasonable, but manifestly in the interest of the safe, expeditious and proper conduct of its business, and that in so doing, there was no unjust discrimination against plaintiff."

Plaintiff's case being dismissed, an appeal was taken to the Circuit Court of Appeals (125 Fed. Rep., 445, 450, 453), and in an opinion written by Judge Thayer, the decision of the circuit court was affirmed, the opinion, among other things, saying:

> "It is manifest, we think, (indeed, so manifest, that we might almost take judicial notice of the fact), that no railroad constructed, through extensive coal fields and engaged in transporting coal to market could, for any considerable period, follow the practice of setting out cars at its station side tracks, some distance from where the coal is mined, and permitting coal to be hauled into the cars by the slow process

of shoveling. The useless consumption of time and the additional expense incident to the handling of the commodity in question, in large quantities in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss, sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains, and the transportation of its business. * * * It follows, of course, that regulations made by a carrier which have these objects in view (expeditious and economical handling of business) and are well designed to promote them, cannot be complained of on the ground that they operate as a preference in favor of one who does comply with them or as a discrimination against those who do not."

To the same effect are the decisions in Arkansas: (*Choctaw, Oklahoma & Gulf R. Co.* v. *State*, 73 Ark., 373, 84 S. W. Rep., 502; *Little Rock & Ft. Smith R. Co.* v. *Oppenheimer*, 64 Ark., 432, 43 S. W. Rep., 145.)

While these cases involved the furnishing of facilities rather than compensation therefor, yet to use the words of the Commission in the opinion in the St. Louis case (14 I. C. C. 17), "there is no difference in principle between the giving of the service and the giving of the money with which to buy the service."

(5) The elevator payments were condemned on the ground that they are not "open to all." Can it be seriously argued then, because the non-elevator operator has not seen fit to invest a dollar in the facility which the carrier demands, these payments are not open to him? The tariffs of the railroads provide that so much will be paid to elevators for performing the service. They say elevators, because, as abundantly pointed out, no other facility can perform the service. Particular elevators are not mentioned. No one, not even the non-elevator operator, is prevented from availing himself of these payments, provided he furnishes the service which the carriers desire, and, in fact, must have in the conduct of their business. The offer is made to all without exception.

"whomsoever will may come." On this point two English cases are interesting, especially as they had to do with the "discrimination" and "preference" clauses of the *English Acts,* from which the language of our own act was borrowed.

In *Evershed* v. *London and Northwestern R. Co.,* 3 Q. B. Div., 134, 143 (App.) (1877), it appeared that the plaintiff was a brewer competing with three other brewers at Burton-on-Trent, where the defendant and the Midland Railway had stations. The premises of none of the brewers were connected by switch tracks with the railways named; but to divert as much traffic as possible to its line, the defendant agreed to cart goods gratutiously for the three brewers as well as allow them certain deductions from the freight rates, the effect of which was that their goods were loaded and unloaded without expense. A like arrangement was refused to plaintiff who brought suit on the ground that the arrangement was an undue preference in favor of his three competitors. Clearly this was true and the court so held, because the defendant had refused to enter into a like contract with the plaintiff, but Bramwell, J., observed:

> "It is open to railway company to make a bargain with a person, *provided they are willing to make the same bargain with any other,* though that other may not be in a situation to make it. An obvious illustration may be found in season tickets; a man is taking a daily journey for a 1s., for which his neighbor who takes it once a month pays 5s. He is entitled to the same benefit, but it is one of which he cannot avail himself. So as to goods. If a million tons are carried for A at a certain rate, B may demand the same rate for the same quantity, though he never will nor can, because his dealings are too small. It is reasonable this should be so. * * *"

In *Nicholson* v. *Great Western R. R.,* 1 Nev. & McN. 121, 125, 149 (1858-1860), the contracts or arrangements complained of were with reference to the transportation of coal. Among the findings of fact was this:

> "The great Western Railway have offered to enter into a similar arrangement to agreement 'A' with the complainants, and upon the same terms; but the latter have refused to accept the same, alleging that it is impossible for them to enter into such agreement."

The sole purpose of the contract was increased traffic. Plaintiff's petition was dismissed, and on a later application for reference, Earle, C. J., said:

> "I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as freely as any merchant, subject only (as to this court) to the duty of acting impartially without respect of persons; *and this duty is performed when the offer of the contract is made to all who wish to adopt it.* Large contracts may be beyond the means of small capitalists; contracts for long distance may be beyond the needs of those whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

The above cases were decided, prior to the enactment of the Interstate Commerce Act and consequently must be considered as having been in the mind of Congress. (*Interstate Commerce Commission* v. *Baltimore and Ohio R. Co., supra.*)

(6) If the offer of these elevator payments was secret, not authorized by statute and not made to all, in a like situation, by a published tariff, then they might, possibly, constitute a violation of section two of the a[illegible]as is contended by the Commission. If such were the facts here, the case of *Wright* v. *United States*, 167 U. S., 512, might be authority for condemning the payments. In that case, one Bruenig and his competitors were dealers in beer, etc. It is this fact that makes the Wright case wholly inapplicable to the facts herein. Bruenig's contract with the Baltimore and Ohio was a secret arrangement, not open to his competitors and not published in the railroad's tariffs, and the payments made

thereunder were, therefore, rebates. This is not the case with these elevator payments. Every road making them has a regularly published tariff to that effect on file with the Commission, thereby proclaiming to the world that the same contract, the same arrangement and the same payments will be made to anyone who will, in the same circumstances, furnish the desired services and have been expressly authorized by statute.

Section two has nothing to do with *general* and *public* arrangements of this character provided by the same law. That section starts out with the proposition "that if any common carrier * * * shall * * * by any *special* rate, rebate, drawback, or *other device*, charge, etc., and plainly was intended to condemn *special* rates, *special* rebates, *special* drawbacks and *other devices*. The association of the words, "rates, rebates and drawbacks," with the word *device* indicates clearly that it was *secret* arrangements that Congress was condemning, not contracts and arrangements open and above board, and available to all who wish to adopt them, and specifically provided for by statute.

The case which the Commission says changed its attitude toward these payments is *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361. As to the facts of the case, it is sufficient to say that they present a secret contract, not provided for in the tariffs of the road in question, and therefore, embodying an arrangement not open to all shippers alike. In explaining the purpose of the act to regulate commerce, Mr. Justice White said:

> "It cannot be challenged that the great purpose of the act to regulate commerce * * * was to secure equality of rates as to all, and to destroy favoritism. These last being accomplished *by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs.* * * *"

Plainly this language does not apply to these elevator payments. They are provided for in the published tariffs of the

railroads, and consequently anything but secret. It is wholly inconceivable that a service authorized by statute, can be the discrimination forbidden by another section of the same law.

(7) The Commission also condemns these payments because of discrimination against St. Louis. Among other things the opinion (14 I. C. C., 328) said:

> "For years these defendants carriers have maintained a certain relation in rates from the fields of production west of the Missouri river to Kansas City and St. Louis * * * Under this adjustment of rates it has been possible to move grain through either the markets at the Missouri river or St. Louis to eastern destinations upon the same terms as to cost and transportation. Today this relation has been altered. Grain can be moved to eastern points for ¾ of 1 per cent per 100 lbs. less through Kansas City than through St. Louis. This is plainly unjust and should be corrected.'"

In the next paragraph, however, is an admission that payments in the same amount are made at St. Louis on business to the south and southeast. Payments of ¼ of 1 cent are made by lines leading east from St. Louis, the tariff authorizing same having become effective after the hearing. Hence it is seen that St. Louis enjoys the same payments in all but eastern territory, and, as to that territory, the only complaint could be as to the amount.

(a) We have already seen that the primary purpose of lines like the Union Pacific in elevating their grain at these "primary" or "intermediate" markets is the prompt release of equipment which in its last analysis is a means for increase of traffic. We have also seen that lines having western termini at these cities are vitally interested in bringing about a condition which will give them an opportunity to get some of the grain for transportation east. The situation with the latter lines is indeed a grave one. Having no "feeders" into the grain fields, they must offer some

inducements to be available at their western termini or else the grain will move via the "through" lines which originate it. So they encourage the development of the "primary" or "intermediate" markets by paying for the transfer of the grain through elevators. Parenthetically these "through" lines are not interested in the development of these "primary" markets. In fact these lines would like to see the Missouri river markets wiped off the map, as then the grain would move through to their eastern termini without stopping and consequently without the present danger of losing it to these terminal lines. This attitude of the through lines accounts for their desire to get rid of these elevator payments, knowing as they do that the transfer of grain at Missouri river cities largely tends to develop the markets thereat. For example, The Santa Fe (a through line) was the instigator of the Peavey investigations. The Burlington, Missouri Pacific, Rock Island, Frisco and M. K. & T. (also through lines) were the lines possibly *advisedly* selected by the complainant in the St. Louis case as defendants to its complaint. Representatives of these lines were the chief witnesses for the complainant, and their uniform testimony was that they wanted to do away with these elevator payments. It cannot be denied that the continued welfare of these "primary" or "intermediary" markets is dependent upon the continuance of elevation or elevator payments, neither of which is desired by the "through" lines

After these payments were established by the "terminal" lines it was not long before the "through" lines were compelled to follow. What were the reasons for it? One was a continual supply of cars as only a prompt release thereof at these "primary" markets could insure. Mr. Ives (Rec., Nos. 286, 287, p. 268) stated that "when witness (Mr. Ives) was with the Burlington (a "through" line) was very anxious to have them build elevators at Omaha to compete with the Union Pacific in the question of prompt return of cars, *because they always had a better supply of cars in the country than the Burlington.*"

Another reason was to retain a share of the traffic moving *from* these "primary" markets. As said (*id.*, 280) by Mr. Voorhees, general freight agent of the Frisco:

> "The payment of allowance is result of competitive conditions and the Frisco would be glad to take them out if it could do so *and still do a fair share of the business.*"

And by Mr. Crosby (*id.*, 274) of the Burlington:

> "This practice is forced by competition, *because another line would be for the transfer if the Burlington did not, and get the haul to St. Louis.*"

Other references might be made to the evidence, but the above is sufficient to show the predicament of the "through" lines, the defendants in the St. Louis case.

Now all of these "through" lines have their eastern termini at St. Louis, hence no situation confronts them such as obtains at these "intermediate" markets. There is no struggle for the outbound business from St. Louis between these lines; their rails terminate there.

Actual and controlling competition over which the defendant "through" lines have absolutely no control imperatively compel them to make these payments. They have no alternative but "to meet the conditions." The compelling force does not exist at St. Louis, hence the discrimination is not undue and therefore not unlawful.

The courts have uniformly held (against the earnest contention of the Commission) that competition which is real and substantial, and exercises a potential influence at a certain point, brings into play the dissimilarity of circumstances and conditions provided by the statute; and the consequent right to deal differently with localities is not destroyed by the mere fact that incidentally a preference or discrimination results. (*Texas & Pacific*

R. Co. v. *Interstate Com. Com.*, 162 U. S., 197; *Interstate Com. Com.* v. *Alabama Midland R. Co.*, 168 U. S., 144; *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S., 648; *East Tenn., Virginia & Georgia R. Co.* v. *I. C. C.*, 181 U. S., 1; *Interstate Com. Com.* v. *Clyde S. S. Co.*, 181 U. S., 29; *Detroit, G. I. & M. Ry.* v. *Interstate Com. Com.*, 74 Fed. Rep., 803 (C. C. A.); *Interstate Com. Com.* v. *C. B. & Q. Ry.*, 141 Fed. Rep., 1003.)

The last two cases are particularly applicable to the situation herein. In the Detroit, G. R. & M. Ry. case the facts were these: The City of Grand Rapids and the Town of Ionia, Michigan, are stations on the above-named railway. In 1858 the station house at Grand Rapids was located about 1¼ miles from the business section of the city. Two rival lines, at that time competing with the defendant company for the traffic to and from the eastward, located their stations within an average distance of ¼ mile from the business section of the city. To make facilities as convenient as its competitors, the defendant established a system of free cartage, *i. e.*, a system of collecting and delivering goods upon the premises of its patrons, and for which no other charge was made than that which appeared in the published tariffs as the freight rate to and from Grand Rapids. The collecting and delivering was done by persons employed and paid by the defendant for that service. No such collecting and delivering was done at Ionia; and it appeared, too, that both points took the same freight rates. Merchants at Ionia brought complaint before the Commission, alleging illegality of the payments for the cartage, and unlawful discrimination; and upon investigation, the Commission, so holding, ordered the practice discontinued. The defendant company declined to obey the order, and a petition was filed in the United States Circuit Court praying for enforcement of the order. Upon final hearing the Circuit Court granted the decree, from which an appeal was taken to the Circuit Court of Appeals, where the decree was reversed and directions given to dismiss the petition.

Among the points disposed of by the Circuit Court of Appeals was one raised and strongly urged herein, i. e., that the payments amount to a reduction in the freight rates. In other words, if Peavey & Co., for example, receive a car of grain from a point in Nebraska, and pay thereon 10 cents per hundred pounds, and then receive three quarters of a cent for elevating and transferring, the net rate, as to them, is 9¼ cents. Suffice it to say that the court refused to sustain this argument in that case on the broad ground that the inhibition of the statute was against the assessing of a greater aggregate charge; saying at page 821:

> "The section means, properly construed, as we think, taking all the rates of fares and charges *incidental* to the transportation together, these shall not be more for the shorter haul; and since, in this case, they are precisely the same, the section, in its very terms, is not violated."

It was (p. 821) also observed:

> "What we do say is that this disadvantage to the Ionia shipper to which we have called attention is not unlawful when it arises by reason of an item of the charge contained in the aggregate of compensation, which, although different, is under the circumstances and conditions, reasonable for the carrier to make in the due course of its business at that place."

Reviewing these "circumstances and conditions," the court held that they were the result of local competition at Grand Rapids, which did not exist at Ionia.

In *Interstate Commerce Commission* v. *C. B. & Q. R. Co., et al., supra*, the question of competition was raised; that relied upon being between Missouri River-Chicago lines in the carriage of packing house products. This competition resulted in making the rates on the manufactured products less than those on live stock, which the commission declared to be unlawful. On cattle coming from the west, therefore, the total transportation cost was

cheaper when the cattle were killed and made into products at the Missouri river and subsequently shipped to Chicago, than when the cattle were shipped through to Chicago and there made into packing house products. The competition was centered at the intermediate points on the Missouri river; precisely the same situation as obtains in the case at bar. The court held, however, that actual competition was a defense, citing many of the cases hereinbefore referred to.

V.

Elevator services are necessary to the carriers.

Irrespective of the foregoing suggestions, the service and right to compensation may be considered in its general aspects. It was fully considered by Chairman Knapp and Judge Sanborn in their opinions.

1. *As a tranfer-in-transit service.*

An important point in the mind of the Commission in determining this elevation question, was whether or not the grain is in transit when it is stopped off at these Missouri river "primary" or "intermediate" markets. If it was in transit, then it was practically conceded that the elevator service was a link in the through transportation and could properly be performed by the carriers, or paid for by them, if performed by others. This was admitted in the opinion (14 I. C. C., 330) in the St. Louis case. Speaking of the Union Pacific it was said:

> "That company may without question provide for the transfer of grain from its own cars to the cars of its con-

nections when that is necessary to complete a through shipment. It can provide these facilities either by an outlay upon its own part or by contracting for the performance of the service at so much per bushel."

The evidence in these cases shows that the grain moves to these Missouri river markets on local billing and this, the Commission now, contrary to its first two opinions, says, conclusively proves the transportation to be local. This question has been already considered (*Supra*, Div. III, par. 3). These views now to be expressed are in addition thereto. That billing is not, in fact, the only criterion with which to determine the "through" or "local" character of transportation has been held many times by the Commission itself and by this court. In another case: (*In Re Through Rates and Through Routes*, 12 I. C. C., 190), the matter was gone into fully by the Commission. This investigation was made after those *In Re alleged unlawful rates and practices in the transportation of grain and grain products by Atchison, Topeka & Santa Fe Railway et al.*, 7 I. C. C., 240 and *Chicago, Rock Island & Pacific Railway* v. *Chicago & Alton Railroad*, 3 I. C. C., 450. It was general instead of special in character, and is therefore presumed to record the present position of the Commission upon this subject. In its opinion in that case, the determinate question was put thus:

> "A careful consideration of all the factors entering into this problem shows that in the last analysis the answer must depend upon a question of fact, this question being, have the carriers over whose lines the shipment is to move made an arrangement. express *or implied*, for a through route?"

That a local rate may be applied to "through" transportation was admitted thus:

> "As was said by the commission in *Brady* v. *P. Co.*, 2 I. C. C. Rep. 131, through carriage implies a through rate.

* * * The rate is either a joint through rate made by arrangement by the parties to the through route, *or it is a combination through rate consisting of the separately established rates, fares and charges applied to the through transportation.* This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established in force at the time the shipment is billed."

As to what factors should be considered, it was said:

"In answering the question of fact as to the existence of a through route, all the incidents and circumstances of the shipment must be taken into account."

Some of these "incidents and circumstances" are stated thus:

"It is therefore evident that such incidents as the billing, the transfer from one carrier to another, the collection and division of transportation charges, *the use of a proportional rate to or from junction points or basing points,* and other like incidents of the transaction may properly be depended upon for guidance as to the existence of a through route."

And in the Social Circle case (*C. N. O. & P. R. R.* v. *I. C. C.*, 162 U. S., 184) cited by the Commission in the above investigation, this court said:

"All we wish to be understood to hold is that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received, in transit by a state common carrier, under a conventional division of charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. *When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."*

Having seen that "incidents and circumstances" besides billing may determine the character of the transportation, we pass to the situation shown herein. The grain produced west of the Missouri river was formerly moved to the consuming destinations east thereof on through rates and billing, but with the privilege of stopover at intermediate points. If this condition still obtained, the Commission admits the elevator payments to Peavey, at least, would be lawful. In their opinion in the St. Louis case (14 I. C. C. 323), it is said, referring to the old condition as it formerly existed at Omaha:

> "If the Union Pacific handled this business through Omaha, as it must, it was necessary to do so upon a joint through rate and as a strictly through proposition. It was, therefore, in fact as well as in theory, necessary that it should in some way provide for the transfer of the grain from its cars to the cars of its connections."

This condition was changed many years ago at Kansas City, and in 1906 at Omaha, in one, *but only one,* particular, viz., the billing. The reason for this change is explained in *Kansas City Transportation Bureau* v. *Atchison, Topeka & Santa Fe Railway,* 16 I. C. C., 198, thus:

> "Originally rates were made from various points of origin to markets farther east (of Kansas City), and, under transit privileges, grain was permitted to stop at a primary market and in due time to be forwarded on the remainder of the through rate from point of origin. This resulted in a number of proportional rates from such primary market, which made the value of the grain uncertain and which created a great deal of controversy. After a time complaint against such an adjustment was filed with the commission, and was later withdrawn under an understanding reached between the complainants and the carriers, which provided for the establishment on grain coming from beyond the Missouri river of one rate from the Missouri river to a given destination * * * regardless of the point of origin of the grain. This rate was called a proportional rate."

Under this new arrangement, new in one particular only, the grain was billed locally to the primary market, *but in connection with the understanding, publicly proclaimed in the tariffs, that it could be subsequently forwarded on the proportional rate to final destination.* This proportional rate only applies on shipments originating beyond and is, therefore, just as much a part of the through rate as the "balance" of the rate under the old plan. **This is admitted by the Commission in *Kansas City Transportation Bureau* v. *Atchison, Topeka & Santa Fe Railway, supra,*** of the very rates now under consideration:

> "A proportional rate means a part of, or a remainder of, the through rate or it means nothing at all, and in a case of this kind there must be an examination and consideration of the entire rate from point of production to ultimate destination."

In fact the proportional is the balance of the rate as the published through rate is the same in amount as the combination of the rate paid to the primary market and the proportional rate beyond. (Stipulation, Par. 5, Rec. Nos. 286, 287, p. 183.)

To further show the similarity of the old and new plans, it is interesting to note the testimony of Mr. Monroe of the Union Pacific on the first Peavey hearing when the through basis of rates and billing was in effect, and that of Mr. Spens of the Burlington on the second hearing after the through basis had given way to the proportional basis.

Mr. Munroe (Stipulation *id,* p. 191) said:

> "When the grain goes out, the Union Pacific's western expense bill is surrendered to the eastern line, where it is verified and stamped. This stamp becomes the authority for the eastern line to accept their proportion of the through rate east of Council Bluffs."

Mr. Spens (page 229) said:

> "I know of no reason why grain should be billed through when the through rate is the sum of the locals * * * On the Burlington the grain coming from the west of the Missouri river takes the proportional if it is going to a destination where the proportional applies—the Mississippi or east. To do this it must have a certificate that it came from points west of the Missouri river."

Thus it is seen that under both plans the rate out depended upon the presentation of evidence in the form of a stamped certificate that the grain originated beyond.

Summing up the "incidents and circumstances" by which the through arrangement is "otherwise manifested," we have the grain moving to these intermediate markets on the separately established rates of the initial lines in connection with the understanding with the east of the Missouri river lines that it can subsequently secure the benefit of the proportional rate. We have the common arrangement further manifested by the outgoing lines insisting upon the presentation of a stamped certificate, an incident wholly inconsistent with a local shipment, before the proportional rate will be applied, and then we have the grain actually moving out on the proportional rate—the rate which the Commission calls a "part of a through rate or nothing at all." The application of a through rate to a shipment certainly proves a through shipment. That a local waybill does not necessarily indicate a local shipment was expressly held *In Re Through Routes and Through Rates, supra*), regarding sugar rates. The Commission there thus quoted from the sugar tariff, showing how the business is handled.

> "Shipments will be waybilled from point of origin to storage point at the local rates and freight charges collected on that basis."

The sugar was subsequently shipped out on proportional rates to obtain which the shipper had to present evidence that it had originated beyond. The express point involved was whether the proportional rate in effect at the time the sugar left the country point, or from the storage point, was to be charged when it moved from the storage point. If the sugar was "in transit" and the transportation "through" then the rate in effect at the time the shipment left the country point was determinate of the rate to be applied on the outbound shipment. The Commission said:

> "The proportional rate is a through rate which can be applied only on traffic moving thereunder from point of origin to destination. At the time the sugar moved from the originating points named this tariff was not in effect, and the local rate applied into Omaha can not be treated as an advance payment upon a proportional rate which was not in effect at the time of origin of movement."

Again, more than nine-tenths of the grain received at these "primary" or "intermediate" markets actually goes beyond. (Statement, H. G. Wilson, Rec., No. 285, pp. 149-151.) This is practically admitted in defendant's answer to the Diffenbaugh bill (paragraph VI, *id.*, pp. 31-35). Now as the elevator payments are only made on grain actually shipped out (Rec., Nos. 286, 287, p. 255) it can be said so far as the issues of these cases are concerned that all of the grain is "through" grain, which in connection with the fact that it moves on a through rate absolutely makes its handling and movement, through transportation.

The old "high ball and shovel" method of transfer is inadequate and impracticable to handle the business. This was abundantly proven on the first hearing of the Peavey case.

Mr. Munroe of the Union Pacific (Rec., Nos. 286, 287, p. 190) testified:

> "The shovel transfer is absolutely impracticable, and the elevator transfer is the best method known."

Again, page 193:

"In shovel transfer it is necessary to have doors of unloading and receiving cars exactly opposite. Have therefore to assign a special switch engine and crew. Have maximum of switching service with minimum of result. When grain is moving, on the track or high ball transfer, have to rely on connecting line's car being ready. Do not with the elevator transfer."

Mr. Stohr of the Chicago Great Western, page 197, testified:

"The shovel transfer was found impracticable and utterly inadequate."

Mr. Stith of the Missouri Pacific, page 200, testified:

"We are of the belief that the old method of shovel transfer of grain is inadequate to our needs, and that the exigencies of the business require some facility that will meet our demands and relieve our yards of the congestion that invariably follows shovel methods. * * * Found shovel transfer was in reality more expensive than elevator service because of the detention of cars."

Mr. Gower of the Rock Island, page 202, testified:

"Shovel system is totally inadequate and wholly unsatisfactory."

Mr. Crosby of the Burlington, page 204, testified:

"Where transfer takes place it is necessary to have some modern method of doing it. Shovel method is not practicable for large amount of business."

All of which brought out the following expression of the Commission in their first decision (*id.*, p. 22, 10 I. C. C. 309, 322) of the Peavey case:

"Some testimony was given as to the feasibility and expense of what is called shovel transfer. This method may be cheaper under favorable conditions and for a limited amount of business, but for the extensive grain traffic of the Union Pacific it is of doubtful economy and otherwise unsatisfactory. The only efficient and adequate mode of transfer is through elevators of large capacity *located at the terminals where the transfer is to be made.*"

(2) *As a weighing service.*

(a) The freight rates upon grain being in cents per hundred pounds, the railroads must provide adequate facilities for securing the total weight of all carloads. This is necessary in order to assess the charges and verify shippers' claims for loss in transit. It is just as much the duty of the carrier to furnish facilities for ascertaining accurate weights as it is to furnish the cars for transporting the goods. The carrier is in the business of selling transportation by weight. It has arbitrarily chosen to predicate the price of its transportation upon so much per hundred pounds, rather than so much per package, per sack or per car. Having done so, it is the plain duty of the carrier to equip itself with the facilities for telling a shipper, the buyer of that transportation, what the total cost will be of transporting a particular shipment. The railroads so recognize, as the testimony (Rec., Nos. 286, 287, p. 228) of Mr. Spens of the Burlington, for example, indicates:

"A tariff has been published by the Burlington to the effect that they will assume the cost of transfer of grain from car to car to release equipment *or to secure elevator weight, which is an operating expense* and does not contemplate any handling or storage of grain."

Both state and federal legislation so recognize. For example, Section 1117 of the Revised Statutes of Missouri, 1889, makes it the duty of railroads to provide proper and adequate weighing

facilities at certain stations, and the application of this statute makes Kansas City one of these stations. Section 1116 requires railroads to weigh carloads of grain when proper request is made therefor at points provided for in section 1117. And failure to comply with these statutes makes the guilty carrier liable to heavy penalties.

The second paragraph of section 10 of the Interstate Commerce Act provides that "any common carrier * * * (which), by means of false billing, false classification, *false weighing, or false report of weight* * * * shall knowingly and willfully assist * * * any person * * * to obtain transportation * * * at less than the regular rates * * * shall be guilty of a misdemeanor * * * and be subject to a fine of not exceeding five thousand dollars." If a common carrier is criminally liable under the law for giving false weights, does not that law at least imply a duty to furnish correct weights?

Then again, a car of grain is very susceptible to leakage in transit. How is the carrier to know the extent of its liability for loss, unless it has proper weighing facilities with which to check up the shipper's claim?

It is true that the shipper has an interest in securing correct weights but his interest is secondary to that of the carrier.

(b) The modern grain elevator with its equipment of hopper scales is the only satisfactory and adequate facility for securing correct weights.

The statement of Mr. Wilson (Rec. No. 285, pp. 150-151), was:

> "These weighing facilities for grain were first provided by railroads installing track scales upon which loaded cars were switched and weighed. For various reasons this method was unsatisfactory and abandoned at market cities. There was adopted the plan of securing said weights by means of scales in grain elevators under the supervision of official weighers, whose certificates are generally accepted by rail-

> roads, shippers and the public. The practice so continued until now it has become a universal system and custom at all market places and an essential part of the handling and transporting of grain, the abandonment of which would demoralize trade, render contracts uncertain, and greatly increase the cost of handling all kinds of grain and give far less satisfaction to the carrier than the methods formerly adopted."

The Commission, in an answer (Rec., No. 285, p. 36), endeavors to negative the importance of this proposition by stating "that such facilities are no more necessary in connection with the transportation of grain, than in connection with the transportation of other traffic." In effect, the Commission says it is not necessary to have the most up to date, the most adequate and admittedly most satisfactory methods to be had. Not all traffic, in fact no other traffic, can be unloaded and weighed in an elevator, and until facilities more satisfactory than those now in use for weighing other traffic are devised, undoubtedly they will have to suffice; but is this any reason why better facilities cannot be used for weighing grain? It is well known that at common law carriers were required to furnish suitable facilities for the conduct of their business, and certainly this duty is commensurate with the most modern facilities available. What was suitable years ago may not be suitable now.

Again, the carriers, having provided elevator weights on grain for many years, cannot legally decline them at this time. This theory has found sanction with the Commission. In one case (*In Re Transportation of Fruit*, 10 I. C. C., 373), it was said regarding refrigeration cars:

> "We think that it is the duty of the respondent railroad companies to furnish refrigeration cars for the transportation of this fruit. While it is possible that these carriers might, at the outset, have legally declined to provide this specific kind of equipment, they ought not to be permitted to do so

at this time. For years they have voluntarily made such provision, and this industry has grown up upon the strength of that arrangement."

This theory is also supported by this observation in *Pullman Palace Car Co.* v. *M. P. R. Co.*, 115 U. S., 587:

> "It may be, as is also alleged, *that it has become indispensable*, in the conduct of the business of a railroad company, to run on passenger trains, sleeping and drawing room cars, with the conveniences unsually afforded by such cars for night travel. * * *"

(c) The Commission suggests (Rec., No. 285, p. 37) this:

> "In this connection, defendant alleges that such weights may be secured by weighing the car before it is loaded and again after it is loaded, on track scales owned and operated by carriers," etc.

A single statement will show the utter impracticability of this suggestion. It is a matter of common knowledge that during the grain shipping seasons, the railroad yards at great markets like Kansas City are congested with freight, mostly grain. Does it take any argument to show that a railroad would rather have its cars weighed at one place with one movement of the cars, rather than switch them through crowded yards to a track scale, then to an elevator to be loaded or unloaded and then back again to the track scale? However, the impracticability of this suggestion is admitted by the Commission in its opinion in the St. Louis case (41 I. C. C., 317, 318), in this statement:

> "All grain shipped to a particular market to be sold and settled for according to the grade, inspection, and the weight of that market *must of necessity be elevated, since it cannot, as a practical matter, be weighed in any other manner.*
>
> It will be seen, therefore, that in the ordinary course of business, all grain must be elevated at the market upon

which it is handled, excepting only such grain as is sold in the car for shipment beyond. This grain may be sold upon sample or it may be inspected and graded in the car. *It cannot be weighed,* and the amount of the grain so dealt in is small."

(d) To recapitulate the benefits of elevators to the carriers from economy of car movement alone: *Under the old plan* if a car of grain had to be transferred, it was necessary to switch it to a specially constructed "highball' track, there to await the car into which the grain was to be transferred. A special switch engine and crew were necessary to switch the car up and down the track in order to get the doors exactly opposite. This plan consumed much time and resulted in more or less loss of grain. After the transfer, the car had to be again switched to the track scales, uncoupled and one at a time run up the scales, weighed and finally recoupled and pulled off. No better epitome could be given to this plan than the testimony (Rec. No., 286, 287, p. 193), of Mr. Munroe of the Union Pacific, that it is necessary to:

"Have maximum of switching with minimum of result."

Under the present system, both of these services are performed at the same place with one movement of the cars, viz., to the elevator. It is not necessary to wait for the outbound car into which the grain is to be transferred, nor to uncouple the cars for weighing, nor to have a special switch engine to move the cars up and down the transfer track "for position." And the best feature of this plan is that the operation is expeditious.

3. *As a general elevation service.*

Besides transferring-in-transit and weighing, the elevator service which the Commission abolishes, is necessary and essential to the carriers serving these "primary" or "intermediate" markets for other reasons. These additional services may be comprehended under the term "elevation," for it is certain that these pay-

ments were originated and are now paid for more than the transfer-in-transit and weighing services already discussed. That there is a difference between transfer-in-transit and elevation is evident from the facts of these cases which have given rise to expressions of the Commission, as well as been the basis of Congressional legislation.

The majority opinion of the Commission in the second Peavey case thus recognized the distinction (Rec., No. 286, 287, p. 27; 12 I. C. C., 101):

> "This being the case, we see no warrant in law for holding, as is suggested, that *such elevation* cannot be provided at *destination* and is lawful *only* for the transfer of grain in transit * * * and, therefore, whether the allowance now made by the Union Pacific Railroad Company to the owners of the elevators at Council Bluffs and Kansas City be called an allowance for the prompt release of equipment, or for the transfer of grain in transit, *or for elevation*, we adhere to the view expressed in the original report. * * *."

The amendment to section one, of the Interstate Commerce Act also thus recognizes this distinction:

> "* * * and the term "transportation" shall include * * * all services in connection with the receipt, delivery, *elevation*, and transfer in transit." etc.

The nature of these additional services is different with the inbound and outbound carrier as the following analysis will show:

First: *With the inbound carrier.*

One of the fundamental causes for the establishment of these elevators was the conservation of railroad equipment. As already explained the lines having eastern termini at these "primary" mar-

kets cannot afford to allow their cars to leave their railways during the grain shipping season. They must be promptly unloaded and returned to the fields. For the same reason the "through" lines must have some intermediate "depot" into which to unload the grain in order to get their cars back into the country for further loading. Hence a highly competitive condition was created, as obviously the line with the greatest number of continually available cars would handle the business

The testimony of the railroad witnesses is very clear regarding the absolute necessity of prompt release of equipment.

Mr. Munroe of the Union Pacific (Rec., Nos. 286, 287, p. 189) testified:

> "Union Pacific had had bitter experience in the past allowing their equipment to go to eastern destinations without transfer. *Must have ample facilities at eastern terminals of Union Pacific in order to get fair use of equipment and regularly serve patrons.*"

Mr. Biddle of the Santa Fe (page 198) testified:

> "It is as necessary for the Santa Fe to have prompt release of its equipment as it is for the Union Pacific."

Again, page 199:

> *"It is an advantage to have equipment released at Kansas City."*

Mr. Stith of the Missouri Pacific (page 200) testified:

> "Transfer facilities at Kansas City are *absolutely essential* to prompt movement of business, *to release* of cars, and consolidation of loads."

Mr. Gower of the Rock Island (page 202) testified:

> *Mr. Baldwin.*—"So at terminal points it is absolutely and

indispensably necessary to the economical handling of the grain business of railroads to have an elevator?"

Mr. Gower.—"I think so."

Mr. Lincoln, formerly of the Missouri Pacific (page 238). stified:

"Found out while with Missouri Pacific that transfer facilities were necessary at Kansas City and all the terminal points, for handling freight. It was necessary for the Missouri Pacific to have transfer facilities for the prompt handling of business and the release of cars through business."

Mr. Munroe again (page 207) testified:

"So far as the release of equipment is concerned, so far as the service which is performed by both is concerned, it is identical, whether the business goes through or whether it stops at Omaha, Council Bluffs or Kansas City."

Mr. Ives of the Wabash (page 266) testified:

"I think that if proper elevator facilities are furnished at nearby termini—as for example, Omaha for Nebraska, and Kansas City for Kansas—the effect is beneficial to the community, to the farming and grain growing communities, *and to the railroads because it enables the cars to do their maximum work. They can be handled promptly to the nearby termini, unloaded there, and then run back to the grain fields.*"

In view of these facts, there is no warrant in law for saying at a carrier cannot provide facilities to secure the prompt lease of its equipment.

Second. *With the Outbound Carrier.*

On the other hand, the benefits and necessities of elevation to e outbound carrier are different from those applicable to the

PAGE CUT OFF

inbound carrier. The question with the latter is how, with the best use of its equipment, to get the grain to market, how to get some of the grain for transportation, and, having succeeded, how to handle it with the maximum use of equipment. So far as the "through" lines are concerned, they are interested not only in carrying the grain to these "intermediate" markets, but also in carrying it out. As they originate the grain they endeavor by all manner of means to retain possession of it for transportation to their far distant termini east of the Missouri river; in other words they want the "long haul." Consequently, those lines having western termini at these "primary" or "intermediate" markets must create a situation which will give them an opportunity to compete for the outbound carriage. In other words, they must see that the grain is "elevated" and "transferred" at these Missouri river markets. This condition is well understood by the Commission, for in the opinion in St. Louis case (14 I. C. C., 327), there were made these observations:

> "Grain brought to Omaha goes almost entirely to some point of consumption east. If the Chicago Great Western is to obtain a part of this competitive business, it must do so by taking it from the elevators at Omaha. It cannot be expected that these through lines, operating both east and west of the Missouri river, will bring the traffic to Omaha and there deliver it to the Great Western. *Competitive conditions, therefore, imperatively require the Chicago Great Western to promote such traffic and commercial conditions as will enable it to secure a portion of this business; in other words, it must bring it about that this grain is elevated and reloaded at the Missouri river.*"

Having brought about this situation by developing these Missouri river markets, these outbound lines are interested in handling the business with the greatest economy of equipment.

By the use of the modern elevator, cars can be loaded to their maximum capacity, something which cannot possibly be done with any other facility. Frequently this maximum of loading results

in consolidating cars, as for example, five inbound cars into four outbound cars, thus saving one car.

Again the outbound carrier may not be in position to promptly furnish the necessary cars, but rather than lose the business, it must provide a depot for holding the grain until the cars can be secured. This important service was thus explained (Rec., Nos. 286, 287, pp. 267, 268) by Mr. Ives of the Wabash:

> "The real service paid for is for the holding of the grain in the elevators until the cars can be furnished to get out—that is releasing of cars or holding of the grain until the other cars can be furnished."

Again:

> "The real object of the outgoing line in paying the allowance is for holding of grain in the elevator awaiting outgoing cars. I claim that this is a service that is equally important to the in and out line to compete with a through line."

(4) *More Satisfactory to Carriers to Hire Elevator Service.*

The evidence shows that it is more satisfactory to the carriers to encourage others to build the necessary elevators and hire the services than to perform the services themselves. (Rec., Nos. 286, 287; Gower, p. 201; Ives, p. 266.)

With the single exception of the Chicago Great Western, at times all lines have followed this policy, have induced the complainants herein to make the investments and are now hiring them to perform these services. It needs no citation of authority to show that carriers may lawfully exercise their own discretion in providing necessary facilities for the conduct of their business.

When all of these features are considered one is the better able to appreciate the language already quoted from *People* v. *Budd*, 117 N. Y., 1, 22 N. E. Rep., 670, 678, 679, and *Budd* v.

New York, 143 U. S., 517, 533, where the indispensability of elevators to the carriers was organized.

VI.

The Peavey contract was valid and should be enforced.

A copy of this contract is attached to the cross bill of the Union Pacific (Rec. Nos. 286, 287, pp. 126-132). Its terms and conditions were fully analyzed in Chairman Knapp's opinion in the first investigation. That it was made in good faith is unquestioned. It is, therefore, unnecessary to further elaborate thereon. It would not, however, be amiss to show from the record how it came to be made.

1. Frank T. Heffelfinger, chief officer of Peavey & Co., which succeeded to the interests of Frank H. Peavey, (*id.* 193), testified:

> "The Union Pacific desired facilities at Council Bluffs, and Mr. Peavey *was asked* to put up the elevator, which was constructed in the spring of 1899."

This statement was not disputed by anyone. It shows that the offer of the contract came from the railroad, and not from Mr. Peavey. The elevator constructed in pursuance of the contract for the benefit of the Union Pacific, was not necessary to Peavey & Co.

Mr. Heffelfinger (*id.* 195) testified in answer to Chairman Knapp:

"Q. Could you conduct your present business on the line of the Union Pacific road without an elevator at Council Bluffs? A. Absolutely. They (Peavey & Co.) could ship the grain to Chicago, and have their facilities there. The elevator was built as an investment, and Peavey & Co. are satisfied that it pays. If they were not grain men, they absolutely could not afford to build and maintain the elevator as a mere transfer proposition. * * * Storage in Omaha is not indispensable, as the company could build elevators in the country as they are doing."

Again, page 210:

"The assumpton all along, Mr. Chairman, and members of the commission, that Peavey & Co. must have an elevator at Council Bluffs and Kansas City in order to take care of their grain business, I want to absolutely dispute. I want to make it forcible that we offer to sell the elevators and agree not to build any more at Council Bluffs or Kansas City; that we can handle our grain business in the country just as well without those elevators as we can with them."

Again, page 264:

"Could better by far go back in the country and build storage there at probably half the cost of what it would be in Omaha, and have every advantage of through shipment."

2. The contract was not a secret one. Chairman Knapp, in the first opinion of the Commission, so said. The fact cannot be successfully denied.

3. As already pointed out the complainants in the first Peavey investigation were rival carriers of the Union Pacific. Having found out that the Union Facific was able, by reason of the Peavey arrangement, to secure a better use of its equipment, and that as a consequence they were at a disadvantage in competing for the business, they desired to crush out the Peavey arrange

ment . On this point, it was in the first opinion of these rivals, said:

> "They also say, and this is perhaps the main ground of their objection, that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowances for a like service at points where the transfer of grain may by them be deemed necessary."

The Commission, however, did not sustain the objection, saying that, "Any resulting injury or detriment to rival carriers is something which the law does not, and, perhaps, should not, seek to prevent." Judges Severens (*Interstate Com. Com.* v. *Detroit Elec. R. Co.*, 57 Fed. Rep., 1012); Thayer (*Little Rock Elec. R. Co.* v. *St. L. S. W. R. Co.*, 63 Fed. Rep., 775, 778), and Mr. Justice Jackson when Circuit Judge (*Kentucky Elec. Co.* v. *L. & N. R. Co.*, 37 Fed. Rep., 567, 631), said the act was not intended to protect one carrier against another.

4. The defeated carriers did not give up, however, and so petitioned for a rehearing. Here it was that the cry of monopoly and unjust discrimination in favor of Peavey & Co. and against the country shipper, was for the first time made. The whole western country was canvassed for witnesses to testify against the arrangement, and out of the thousands engaged in the business, only sixteen witnesses in all, and out of all, only three from the country, Messers, Leflong, McMurray, and Werther, could be found to testify. Their testimony consists largely of opinions, and when analyzed carefully have no probative force. A simple statement of the facts shows absolutely and conclusively that the contract neither creates a monopoly nor disables competitors from competing for the business. Mr. Munroe (Rec., Nos. 286, 287, p. 253) showed that Peavey had no monopoly, testifying thus:

"There are 210 country elevators along the line of the Union Pacific in Nebraska, of which the Omaha Elevator Company have 74, and the Trans-Mississippi Company 24. Out of the total number, the line houses represent 98, or 46.6 per cent. of the facilities, the individual houses represent the remainder, 112 houses, or 53.4 per cent. The line houses in the year 1905, with 46.6 per cent of the facilities, did a total of 38.5 per cent. of the business, measured by carloads. By line houses is meant the elevators belonging to the two companies, Omaha Elevator Company and Trans-Mississippi Company. For the year 1904 these elevators did 35.4 per cent of the business, and for the year 1903, 40.4 per cent. In the year 1905, at Cozad there were shipped 416 carloads of grain, of which the Omaha Elevator Company shipped 87, or 20 per cent.; the Platt Grain Company, 123 carloads, or 29 per cent. That is Mr. Leflong's company. The Cozad Grain Company shipped 78 carloads, or 19 per cent.; T. L. Carroll, 96 carloads, or 23 per cent.; and J. H. Darner, 32 carloads, or 9 per cent. At Lexington there were 428 carloads shipped, of which the Lexington Mill & Elevator Company, Mr. Leflong's company, shipped 191 carloads, or 45 per cent. This probably included flour. H. P. Nelson shipped 142 carloads, or 33 per cent., and A. T. Woodsum, 95 carloads, or 22 per cent. The Omaha Elevator Company have no house at Lexington."

5. The record shows absolutely the contract was sought by the Union Pacific, that it was generally known when made, that the payments made thereunder have been published in the tariffs, that a similar contract is available to anyone who wishes to adopt it; and, so far as the road is concerned, the service rendered "has proven eminently satisfactory." In the words (*id.* p. 221) of the unfriendly witness, Jocquith, "this contract (Peavey's) I consider the *fairest* contract that was ever made between a railroad and a shipper." Peavey & Co. consistently performed its part of it, stood ready to continue performing the services provided thereunder, and the Union Pacific, heretofore defender of it, was rightfully decreed to comply with its obligations.

6. So far as the Commission is concerned, having thrice approved the general arrangement, once informally, and twice after full and complete public hearings, in which the contract was severely attacked by rival carriers, it should have hesitated to reverse itself. Its contention would be unjustifiable even though the obligations of a contract were not outstanding, but here the well recognized duty to stand by precedent is augmented by the fact that the validity of a contract was twice affirmed, and the decisions voicing that affirmance acted upon by others in investing thousands of dollars in elevators. The doctrine of *stare decis* should have been applied. This surely was a case where it should have been applied if there ever was one. That this doctrine should in cases like these, apply to decisions of the Commission, was really recognized in *New York & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361.

Here the Commission urged the passage of a law legalizing and authorizing such contracts and arrangements and later, after hearing, declared this contract to be legal. Nothing occurred thereafter to make it illegal. No illegitimate practice was ever pursued under it.

7. The Commission cited the New York, New Haven & Hartford case, and *Armour Packing Co.* v. *United States*, 209 U. S., 56, as well as many others, to show that any contract is null and void to the extent that compliance with its terms necessitates the doing of something prohibited by the Interstate Commerce Act. The Peavey contract, however, did not when made, nor does it now, contravene the statute in any particular. It accords therewith. The payments made thereunder were published in the tariffs of the Union Pacific as required by law. The law's prohibition is against unpublished special arrangements made for the exclusive benefit of one shipper or set of shippers, and not open to all alike. In all of the cases cited the rate charged

and accepted by the shipper was a special rate, not published and not known to the other shippers. Clearly the contract herein was not clothed with any such stigma, and should therefore not be condemned as being in the same Category.

8. The question in the Peavey case was as to the validity of the contracts between the Union Pacific Railroad Company and Peavey & Company, both at Council Bluffs and at Kansas City, the contracts and the business transacted under them being practically identical at both places. The same reasons existed for the making of the contract in each place. Instead of confining itself to this question of the validity of those particular contracts. and the legality of the practices under them, theretofore affirmed and afterwards approved by Congress, the scope of the Commission's inquiry was enlarged to take in the general question of allowances by railways throughout the country, to elevators and grain dealers indiscriminately, not only for transferring grain at a market place or terminus of a railroad from one car through an elevator to another car for shipment, as a part of the transportation of the grain involved, but also for clipping, cleaning, grading, weighing and mixing grain—matters which have no relation whatever to transportation and which were in no manner contemplated by, or embraced in, the provisions of the Peavey contracts, nor in any of the practices or things which have been done under either of them. The Commission should have held strictly to the consideration of the concrete case before it. The questions involved related only to the validity of these contracts, and to the legality of the practices under them. The contracts should not have been declared illegal or in violation of law because some other railroads or shippers may have attempted to make them an excuse, without reason or justification, for illegal and unjustifiable practices. Their legality or illegality should have been, as they twice were, determined by a considera-

tion of the circumstances and conditions under which they were made, and are to be justified. The reasons which impelled and justified the Union Pacific Railroad Company in making these contracts and in paying this transfer charge, do not apply and cannot be fairly and honestly applied to any other railroad not similarly situated. The termini of the tracks of that company being at Kansas City and at Council Bluffs, the destination of the grain transported over its lines to those points being beyond those points, the Union Pacific's equipment, in which the grain was being transported, must either be permitted to go through to the ultimate destination of the grain, or the grain must be transferred at the terminal points to cars of other lines. There is a clear distinction between a terminal for the grain and terminal points for the railway lines. Council Bluffs was never a terminal point for the grain for local consumption and is not today; neither was nor is Kansas City, except for limited quantities; and those quantities, however limited, which the testimony shows are disposed of finally at either Omaha or Kansas City, have never entered into nor received the benefit of the terms of these contracts, or either of them. As to the railway company, Kansas City and Council Bluffs were terminal points for the Union Pacific railway tracks, and an arrangement to transfer the grain from the cars of the Union Pacific to the cars of some other line to continue the transportation of the grain to its final destination cannot, upon any principle, be held to be illegal; yet, that is all which it provided for in either of the Peavey contracts, and all which has ever been paid for. No clipping, cleaning, mixing or other manipulation of the grain in the elevator is in any manner contemplated by, nor any payment therefor provided for, in either contract. Any other railroad company, under the same circumstances and conditions, would be amply justified in making a similar arrangement, entirely independent and apart from the provisions of the Interstate Commerce Act, which includes

this transfer or elevation as a part of transportation. Because a railway company so situated and at such points may so provide legally, is no reason or excuse for the same provision or allowance being made to grain dealers situated at local points on the line of that or any other railroad. To confine this service to such terminal points and large market places and to such conditions and circumstances as exist with relation to the Union Pacific railway and the Peavey Company would be to sanction only legal agreements, and would avoid all confusion and trouble in which the Commission evidently found itself involved, by any sanction, or apparent sanction, of such arrangements at other places under other conditions.

The introduction of these questions and practices—so foreign to the original inquiry—which were, by some undisclosed method, injected into this case for the purpose of invalidating these contracts, caused the Commission and the people who desire to have the contracts declared invalid, to lose sight entirely of the principle that the obligations of a contract, honestly and fairly entered into and faithfully carried out by one party, were entitled to at least respectful consideration, and should not have been flippantly ignored in the consideration of the questions involved in his case. At the time when the contract was entered into, it was so made at the request and upon the instance of the Union Pacific Railroad Company, and because it wished and needed the service performed for it, which Mr. Peavey contracted to perform. Mr. Peavey had elevators at Chicago, Minneapolis and Duluth, the three terminal points for his grain, amply sufficient for all his needs and purposes. He had no elevator at Council Bluffs, and it was not necessary that he should have one there. While an elevator at that point might in some instances be a convenience to him, it was not a necessity, and he had no intention of building a house there, and would not have done so for his own purposes. It was built by him in reliance upon, and because

of, the contract he made with the Union Pacific for the transfer of grain through the house. There is no pretense that it was not *bona fide*, and the first opinion held that the contract was entered into in good faith. It was not to cover up a secret rebate or advantage, or for any illegal or unjustifiable purpose. Relying upon that contract and upon the faith of its obligations and the benefits to be derived under it, Mr. Peavey invested $200,000.00 in an elevator at Council Bluffs, and a large amount in another at Kansas City, which he would not otherwise have done; which, without this contract, would be unprofitable investments, and which, shorn of its benefits today probably could not be disposed of for one-half the cost of the same. Congress sanctioned the arrangement by permitting it to stand. This, too, at the request of the Commission.

Now, to say that because some grain dealer in the interior of Kansas or Nebraska, or somewhere else, who has not invested a dollar in an elevator, nor done anything in reliance upon a promise to pay this transfer charge, complains that he is not getting the same remuneration for a similar service done for himself alone, and at his own instigation and for his own benefit—to say that such complaint is an argument against the validity of these contracts, seems to be a statement without force or reason, and one which cannot, to any extent nor to any degree, justify the finding that the contracts in question are illegal

On the first hearing, although ample notice was given to everybody and ample opportunity was afforded to anyone for complaint, none from any grain dealer was heard; a fact commented upon in the first opinion. The validity of these contracts was questioned solely by certain railroad companies who were differently circumstanced, whose lines did not terminate at Kansas City or Council Bluffs, who had no real legal reason or justification for entering into such an arrangement—no necessity for it; and on the second hearing, after the most industrious search for dis-

gruntled grain dealers, the showing in regard to this arrangement being any advantage to Peavey & Company over other competitive grain dealers, was absolutely void of persuasive force.

The Commission by its second order, in which Peavey & Company reluctantly acquiesced, cut out of the compensation provided for in the contracts everything but the bare, naked cost of the transfer. If there ever was any pretense for holding that the sum provided for in the contracts was in excess of the actual cost of the service rendered to the railway company, and therefore amounted to a rebate or discrimination against other shippers, that element was then eliminated, so that if the contracts are now to be declared invalid, upon what ground and for what reason is such a ruling to be made? Is the whole contract to be invalid or only such portion of it as relates to the payment of the certain sums for the transfer of the grain through the house? Take the Council Bluffs contract, for instance. This was one indivisible contract. The railway company, in consideration of certain things, to be done by Peavey, conveyed to him the land upon which the elevator was built. It also agreed to do certain other things; among them to pay this transfer charge. It was upon the faith of all those considerations that Mr. Peavey entered into the agreement to build, operate and maintain the elevator, and to receive from the railway company any grain tendered by it which originated on the line of said railway company, and which might be consigned to or in care of said elevator, and to promptly transfer said grain from said railroad company's cars through said elevator. Now, suppose this contract as to the payment of the transfer charge, is declared to be invalid, and the railroad company, by order of the Commission, is released from its payment or ordered to cease payment, and does so, is the entire contract abrogated; is Peavey & Company relieved from all of its obligations under the contract? If not, why not? How can it be held that the money considera-

tion which it is to receive for the performance of its part of the obligations of the contract, is to be ignored, not paid to it, and it to be still held bound to perform on its part the obligations of the contract? It does not seem to be possible that contract obligations can be so flippantly set aside and treated as of so little force and effect. If there were any fraud, intentional violation of law, secret rebating or discrimination in any manner entering into this contract, by which it might be invalidated, things might be different, but the legality of the contract was twice affirmed by the Commission, after full, complete and thorough investigation and discussion; and it is trifling with the dignity of the Interstate Commerce Commission as a public body, to whose care great and sacred interests are confided, to feel or to admit that there is no more stability or reliability in those decisions than twice to affirm the validity of a contract, and, then, without any additional reason or cause, to decide exactly contrary and hold that it is invalid.

Under the *old* law, the right of the Commission to inquire into this matter was challenged upon the ground that the service was not interstate commerce, but a mere incident thereto. In *Munn* v. *Illinois*, 94 U. S., 113, 135, such was declared to be the law, *in the absence of congressional legislaton*. This body asked for and obtained the present legislation. The law was passed to give the Commission that which is asked, the right to fix a reasonable rate for the service. In view of its history, this law is as applicable to this case as if there had been written therein words applying it to this Peavey contract.

This service now must be furnished by the carrier; it can pay the shipper to do it; the limit of the power of the Commission is to inquire into the reasonableness of the charge. To the extent that it is excessive, it can only become a discrimination.

The concrete facts of the case are to be considered. The service was rendered at the terminus of a great railroad system, and at a public market. A vast amount of money was expended upon

the faith of a contract made at the solicitation of the railroad company for a laudable purpose, a contract legal and valid when made and one which Congress not only could not, but was by this body asked not to affect. While incidentally there might be *convenience* to a shipper, yet the theory of the Commission in asking the legislation, and Congress in enacting it, was that whatever was the *actual* value of the service could be paid. In the excess of caution that price has been pared down so as to exclude the possibility of *any* profit. The statute requires the carrier to do two things: furnish "elevation" and "transfer in transit." Elevation could well have been defined as the service of elevating at the terminus of a railroad into an elevator and then loading out. If more service is rendered than the "elevation" and "transfer," that is something for which payment is not to be made. Test it by the public warehouse. Suppose there were a public warehouse at Council Bluffs rendering the *entire* service, elevation and general elevator service, under a contract by which the railroad was, as part of the transportation service, to pay for the elevation service, and Peavey for all other services. The elevation service alone being worth ¼ of a cent per 100 pounds would be the sum paid by the railroad; the balance would be paid by the shipper. Congress has said that for the service the payment can be made to the shipper. The Commission cannot repeal this law; having had it passed to fit this case, good faith requires a reasonable effort to carry it out. With the efforts of others to use it as a cloak, device or scheme to meet dissimilar conditions, we have no concern. Let each case take care of itself. But because other railroads may wish to apply the practice at other than terminal points, or abolish it entirely, that small shippers with no investments desire to obtain something for nothing, need not concern us. Contract obligations are outstanding; good faith and fair dealing by the parties call aloud for protection. All that is asked is that the Commission stand by and enforce the law passed at its solicitation. It has exercised the power for

which it asked. It could do no more. It surely cannot render ineffective an act of Congress; and should not, if it could, when it was responsible for the legislation.

VII.

Jurisdiction.

(1) The statement appended to the stipulation in case No. 285 (pp. 149-151) shows a list of elevators and the large amount invested in each which were erected subsequent to and prior to January 1, 1904, when the first decision of the Commission, sanctioning the contested payments, was made. Much other capital is invested in the general grain business, all of which is directly interested in and affected by the outcome of these cases. Peavey spent large sums by virtue of an express contract. Peavey was a party before the Commission to one case from its outset. Diffenbaugh and his co-complainants by petition for rehearing presented their grievances in the other.

(2) Many of these investments were made and the business of complainants developed largely upon the faith of the decisions of the Commission approving and sanctioning arrangements between shippers and carriers for the performance of services necessary and convenient to the latter in the conduct of their business. The investigations into the icing and refrigeration contracts and the Peavey-Union Pacific arrangement, were held in the west, and can be reasonably presumed to have come to the notice of the complainants. As hereinbefore suggested, the Peavey investigations are the only elevator investigations ever undertaken

by the Commission, so the Missouri river elevators were undoubtedly referred to in its annual report for 1905, wherein it said:

> "There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers, etc. *Such preference may take the form. * * * of an excessive elevator charge to the owner of the grain, etc.* It has been suggested that the Congress should prohibit railways from employing any agency, or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, *it would seriously interfere with property rights which have grown up under the present system.*"

The Commission thus admitted that the property rights of these complainants have grown up under the present system. A court of equity can, therefore, protect them against an unlawful order of the Commission.

(3) The investments having been made, and the business of complainants developed, upon the faith of the "present system"—thrice approved by the Commission as to elevator arrangements—that body cannot now turn around and take any action which has the effect of taking complainants' property without due process of law. The Commission heard and then denied complainants' application for a rehearing, although the proceedings showed upon their face that they were vitally interested, so even if it should be held that the present statute makes no express provision for court review of the Commission's decisions, except possibly at the suit of a defendant carrier, certainly the equity jurisdiction of this court is broad enough to reach out and prevent the taking of property in violation of the constitution of the United States when it is done under an express order of the Commission.

(4) The decisions and order of the Commission in this case are a clear misinterpretation of the amended statute, and a misconception of its duties regarding incidents of commerce. In *Stickney* v. *Interstate Commerce Commission*, 164 Fed. Rep., 638, and *M. K. & T. R. Co.* v. *Interstate Commerce Commission*, 164 Fed. Rep., 645, the court affirmed its right to judicially determine the validity of an order of the Commission, likening its power to that repeatedly held to exist upon the ground that the orders of administrative and legislative bodies were always subject to review when, through misconception of their duties, any private right was impaired (*Moore* v. *Robbins*, 96 U. S., 530, 545; *James* v. *Germania Iron Co.*, 46 C. C. A., 476, 107 Fed. Rep., 597; *Wallace* v. *Adams*, 74 C. C. A., 540, 143 Fed. Rep., 716; *Garfield* v. *U. S.*, 211 U. S., 249.)

No point was made that Peavey & Co. could not sue; it was, however, contended below, that complainants in the Diffenbaugh case cannot.

The services performed by those complainants are necessary and essential to the carriers in the conduct of their business; the preference in favor of the elevator as against "other means" is lawful, legitimate and not undue or unreasonable; the arrangements generally entered into between those complainants and interested carriers for the performance of the desired services have been three times approved by the Commission, and, at its request, sanctioned by congress. Simple plain justice therefore demands that the Commission stand by its first decisions and that the contested orders be annulled.

(6) Judge Sanborn's opinion fully treats (176 Fed. Rep., 409, 415-417,; Rec. No. 285, pp. 285-287) of this question. His conclusion that the bills were maintainable seems incontrovert-

able and can be well adopted as appellees' argument of the proposition.

Respectfully submitted,

JOHN BARTON PAYNE,
M. B. KOON,
FRANK HAGERMAN,
Solicitors for Appellees, Complainants below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

No. 286

INTERSTATE COMMERCE COMMISSION

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

No. 287

UNION PACIFIC RAILROAD COMPANY

vs.

F. H. PEAVEY AND COMPANY, OMAHA ELEVATOR COMPANY, AND MIDLAND ELEVATOR COMPANY.

BRIEF FILED BY THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY BY LEAVE.

ROBERT DUNLAP,
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Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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BRIEF FILED BY THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY BY LEAVE.

The Atchison, Topeka and Santa Fe Railway Company being interested in a correct decision of

the question involved in these cases, takes the liberty of making the following suggestions for the consideration of the court:

The question involved is the validity of an allowance or payment made by the Union Pacific Railroad Company to a shipper of grain over its line for the service of unloading such grain into elevators owned by such shipper at the terminus of the railway, which unloading is for the purpose of cleaning, clipping and mixing the grain for market purposes or storing the same for a longer period than ten days awaiting reshipment to some available market, while no allowance is made to such shipper's competitors because either they do not wish to elevate their grain for such purposes, or if they do, would be obliged to pay some elevator company for such service. We shall contend that the service for which the allowance is made to Peavey & Company is one rendered in respect to its own grain and for its own benefit and is not a service which the railway company, as a carrier, is required to render; that, therefore, by making the allowance to such an elevator owner, who is also a large shipper of grain, the railway company grants to it a concession or reduction from the transportation charge, and in effect gives it an undue advantage over its competitors.

In its original investigation and report of June 25, 1904, it is apparent that the Commission was somewhat misled as to the true situation, and as that investigation had been instigated by rival carriers though to protect their own shippers purchas-

ing in competitive territory, the Commission did not give to the matters involved the serious consideration shown in its subsequent investigations and reports. It labored under the impression that the allowance of a cent and a quarter per hundredweight of grain shipped, provided for in the contract between the Union Pacific Railroad Company and Peavey & Company for the elevation of grain, was in respect to grain intended for continuous through transportation beyond the lines of the Union Pacific Railroad Company and the purpose of the allowance was to secure the services of the elevator company in effectuating a transfer in transit of the grain to the cars of connecting lines thus relieving the cars or equipment of the Union Pacific Railroad Company, and making the same available for its own uses. The Commission was, therefore, under the impression that the services rendered were wholly for the benefit of the railway company. Their attention was either not called to the fact or the same was overlooked, that while the grain might be falsely billed beyond the lines of the Union Pacific Railroad Company to St. Louis, as a matter of fact it was stopped at the elevators of Peavey & Company in either Omaha or Kansas City, unloaded and stored in such elevators for an indefinite period, mixed, cleaned and graded to make the same marketable, and then reshipped by Peavey & Company to any point where there might be a favorable market.

After the passage of the Hepburn Law several railway companies, including the Atchison, Topeka

and Santa Fe Railway Company, filed a petition for rehearing of the question involved, which resulted in a further investigation and in the report and order of the Commission of April 9th, 1907. (Transcript, 25-35.)

In this report the majority of the Commission made the following findings among others (Transcript, 28):

> "The vice in the situation at Council Bluffs and Kansas City arises out of the fact that the Peavey interests, besides operating the elevators in question for the railroad company, are also extensive buyers, sellers, and shippers of grain. If they were elevator men only, the amount of the allowances paid to them by the railroad company on the grain of other shippers would not have been the occasion of inquiry by the Commission, unless upon complaint by a shipper that the allowances entered into the rates and made them excessive or were being used covertly as a rebate. *But being themselves dealers in grain, they perform a service for themselves and for their own grain, although operating the elevators under contract with the railroad company.* It is for this reason that we still regard the arrangement as objectionable, although not necessarily and in itself unlawful. Such relations between a carrier and a shipper as the Peavey people enjoy with the Union Pacific Railroad Company, although more frank and open than the fictitious leases and contracts with elevator companies that are sometimes resorted to as a cover for rebates and other unlawful practices, nevertheless breed distrust and suspicion. Arrangements of that kind easily lead to abuses and ought not, therefore, to be encouraged. They not infrequently result in some unfair advantage to the shipper concerned. That is the case

here. The record discloses that practically all the grain going into those particular elevators belongs to Peavey & Company. They therefore do the work under the contracts with the railroad company in a double capacity and with a twofold interest in the result. They are paid by the company for performing an elevation service for its shippers, and the service they render is chiefly in connection with their own grain. Besides the profit, often quite substantial, on the mixing of an inferior with a superior quality of their grain, thus raising the average grade of all and increasing its value, they receive an allowance for its elevation. The arrangement thus puts them on a special ground of advantage as buyers and sellers and shippers of grain."

Notwithstanding the finding that Peavey & Company were performing the service for themselves in respect to their own grain the majority of the Commission seemed to think that an allowance of three-quarters of a cent per hundred pounds, being the actual cost of unloading and elevating into the elevators, would not be unlawful but anything beyond that would be. Commissioners Clements and Lane dissented from the legal conclusion.

In Commissioner Lane's opinion it was stated (Transcript, 33, 34):

"The Peavey Company buys grain on the line of the Union Pacific and takes out bill of lading, giving St. Louis as its destination. Why it takes such billing no one can explain. It receives no better rate by reason of following this procedure. The St. Louis billing is, in fact, a sham. It serves no purpose save to give color to the pretense that the grain is on its way to St. Louis and is properly subject to transfer at

Omaha. Mr. Munroe, traffic manager of the Union Pacific, testified that his road handles the grain on a local way-bill to Omaha, and that upon delivery at Omaha the through bill of lading is absolutely retired. Omaha is the destination of the grain; not its point of ultimate consumption, perhaps, but its destination from an immediate transportation standpoint. Therefore, as it goes out of the possession of the railroad at Omaha and out of the control of any carrier, it seems to me conclusive that it is not transferred in transist."

On promulgation of this decision the Union Pacific Railroad Company reduced the allowance contained in its former circular and promulgated the following circular (Transcript, 142, 143):

"Union Pacific Railroad Company.
The Topeka & Northwestern Railroad Company.

Allowance to Elevators Located at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., for Transferring Grain to Secure Prompt Release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads, transferred by the elevators at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. or the Topeka & Northwestern R. R. (not connecting lines), west of and including Gilmore, Nebraska, and Muncie, Kas., and be transported by Union Pacific R. R., or by the Topeka & Northwestern R. R. and Union

Pacific R. R., from such originating points to South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., or Kansas City, Mo., respectively.

2. The allowance will apply only on grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, or connecting lines and the release and return of the empty cars to the Union Pacific R. R. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific R. R. to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific R. R. and the return of the empty cars by the connecting lines to recognized points of interchange.

4th. Elevator companies, in presenting their claims for the above allowance must substantiate, by duly certified records of connecting lines, the reshipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

Issued and mailed to I. C. C., May 16, 1907.

Effective June 1, 1907, by order of Interstate Commerce Commission."

While this circular appears to hold out the allowance to all elevators at Omaha and Kansas City in fact it can only be availed of by Peavey & Company whose elevators are alone located on the tracks of the Union Pacific Railroad Company at Omaha and Kansas City, since under the third subdivision of the circular the allowance is only made

with reference to cars *returned* empty to the Union Pacific Railroad Company within forty-eight hours. The railroad company would spot its cars at the Peavey elevators and they could be readily unloaded within that time and no return would be necessary as they would be upon the Union Pacific tracks, but as to elevators located on switches of connecting lines the condition would be impossible of compliance as shown by the opinion of the Commission on certain complaints of other elevator companies for reparation. (See Transcript, 147 to 162.)

While the purpose stated in the circular is to secure prompt release and return of equipment, that purpose would seem to be illusory from the first condition, namely,—the grain must originate on the Union Pacific Railroad or the Topeka & Northwestern Railroad within a certain territory, and not on connecting lines, and be transported to Omaha or Kansas City by the Union Pacific. It is not made in reference to grain originating at other points or with reference to cars belonging to the Union Pacific.

The fourth paragraph of the circular evidently contemplates that the allowance will be made in respect to grain which will be *reshipped* from the elevator over any of the connecting lines, thus contemplating the holding of the grain for indefinite periods in the elevator awaiting reshipment at the pleasure of the shipper and contemplating reshipment to any point and not a through shipment in accordance with the original bill of lading.

The ruling of the Commission of April 9, 1907,

resulted in numerous protests and complaints from the Chicago Board of Trade and others who were demanding a rehearing and a further investigation.

In a supplemental report of the Commission (Transcript, 35, 36) the proceedings were reopened for further consideration, particularly upon the question as to the purpose of the elevation and storage of the grain by Peavey & Company and the effect of the same. On this further investigation the Commission came to the conclusion that any allowance made to Peavey & Company, as a shipper of grain, for the service of elevating the same into its own elevators to be treated, clipped, cleaned and mixed for marketing, or storing of the same beyond a period of ten days, would give such shippers an undue preference over others as it would simply result in paying such shippers for services which they were rendering for themselves in respect to their own property. (Transcript, 38, 39.) An order was thereupon made (Transcript, 40) forbidding the Union Pacific Railroad Company from paying an allowance to Peavey & Company on their own grain received into their elevators at Kansas City and Council Bluffs that is not reshipped out of said elevators within ten days, or from paying such allowance in respect to grain so elevated that has been mixed, treated, weighed or inspected in their elevators. The validity of this order is involved in this suit.

The final conclusion of the Commission was evidently influenced by a careful consideration of the

ruling of this court construing the undue preference clause of the Interstate Commerce Law in the case of *Interstate Commerce Commission* v. *Chesapeake & Ohio Ry. Co.*, 200 U. S., 361.

The conclusion and order of the Commission, we believe, was rather conservative and might have gone much further.

While the grain was ostensibly consigned originally to St. Louis, yet it was stopped at Omaha, unloaded by the shipper from the car into its own elevator, where it was cleaned, clipped and graded and generally sold, and then shipped out under a new bill of lading to a new destination, generally to a new consignee. When the elevator company took possession of its own grain, unloaded the same into its own elevator, to be held there for an indefinite period, and where it might be either sold or reshipped to a new destination, the carrier having lost all control of the shipment, the relation of carrier and shipper had ceased with delivery of the carload on the elevator track for unloading. The owner of the grain would have had the lawful right at any time to stop it in transit upon surrender of the bill of lading, and take possession of the shipment, thus terminating the contract of carriage upon paying the carrier the rate to destination if demanded.

The excuse given for making such an allowance was that by reason of the arrangement the equipment of the initial carrier, the Union Pacific R. R., would be more readily released. But it is obligatory upon the shipper to remove his goods when the car-

riage has terminated or whenever he terminates the same by taking possession of his goods, and he is obliged to be diligent in removing his goods and relieving the cars of the carriers, especially as to carload shipments.

2 Rorer on Railroads, pp. 1286, 1290.

Alabama & Tennessee Rivers R. R. v. *Kidd*, 35 Ala., 209, 218.

In respect to carload freight, if the same is not promptly unloaded by the shipper after notice, the carrier may charge a reasonable sum as demurrage for the detention and use of its cars, in addition to the freight rate. The carrier is under no obligations to pay the shipper to promptly remove his freight in order that the cars or facilities of the railway company may be freed from the burden of such freight. In undertaking to unload the grain and put the same into their own elevator, especially for the purpose either of storage or of preparing the same for market, Peavey & Company were but performing a service for themselves and not a service which it was obligatory upon the railway company to perform;—certainly not without extra compensation. It was the duty of Peavey & Company to unload and take away the grain when the cars were left at a convenient place on the tracks of the railway company for unloading.

Railway companies are not required to make personal delivery of freight at the warehouse or place of business of consignees.

2 Hutchinson on Carriers, 3rd Edition, Sec. 701.

With reference to bulk freight in carload lots, such as grain, it is well settled that delivery thereof is usually made by placing the car at such a convenient place upon the tracks of the railway company as will permit the shipper to unload the same. The duty of loading and unloading such freight is upon the shipper as it is merely the duty, in the first instance, to place the same in the custody of the carrier for transportation, and at the terminus to come and take such freight away.

Schumacher v. *C. & N. W. Ry. Co.*, 207 Ill., 206, 212.

Gregg v. *Illinois Central R. R. Co.*, 147 Ill., 550.

Vaughn v. *New York, N. H. & H. R. R.*, 61 Atlantic, 695.

2 Hutchinson on Carriers, 3rd Edition, Sec. 711.

4 Elliott on Railroads, 2nd Edition, Sec. 1521, pp. 247, 248.

2 Rorer on Railroads, pp. 1233, 1282.

Delivery of the grain was made by the railway company when the loaded cars were placed at the elevator for unloading. The transportation then ended. The obligation of the railway company as a common carrier ceased when the shipper took possession of the cars for the purpose of unloading the contents into its own warehouse. In so unloading and elevating the grain for its own purposes the shipper performed no service for the carrier in connection with the transportation.

It was claimed before the Commission by Peavey

& Company, that under Section 1 of the Hepburn Law of 1906, amending the Interstate Commerce Law, it was obligatory upon railway companies to afford elevation at terminals under the definition found in said section of the term 'transportation' as used in the act. The provision relied upon is the following:

> "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and the handling of property transported."

It was contended that as a part of the transportation it was the duty of the carrier to furnish "elevation and transfer in transit," and that, therefore, the elevation of the grain of Peavey & Company by that company into its own elevator for the purpose of storage, etc., was a service which, under the above provision, the railway company must perform. The elevation in question required by Peavey & Company was that which takes place upon the termination of the transit or transportation of the property and is one which is necessary rather in the conduct of the business of Peavey & Company of buying and selling grain at Omaha or Kansas City than would be necessary on the part of the railway company to make delivery of grain transported to any of those markets.

The "services" included in the term "transportation" as used in Section 1 of the Hepburn Law, so

far as elevation may be concerned, are those in respect to elevation which the carriers for their own convenience find it necessary in order to effectuate a transfer in transit from car to car or from one railroad to another under a through bill of lading in case of a continuous shipment. The word "elevation" is connected with the words "transfer in transit" and was evidently intended to refer to the same transaction. "Elevation *and* transfer in transit" is what is provided for, namely,—that elevation which is essential to effectuate a transfer in transit of a through shipment. It refers only to elevation which becomes necessary to effectuate such transfer in transit under a through bill of lading, for in such case it would be obligatory upon the railway companies, of course, to perform that service as it would be obligatory upon them in such case to perform the service of transportation. Such services would be embraced within and covered by the transportation charge as constituting a part of the services rendered in the transportation of freight from the point of origin to destination. It was certainly not intended to make it obligatory upon railway companies to furnish elevators and elevator service at the terminus of the transportation in order that the grain might be stored therein and prepared for sale.

But should the carrier voluntarily undertake at the terminus of the transportation to temporarily store such grain in some elevator, manifestly it would have the right to make a separate and additional charge therefor over the charge for transportation, just as it would have the right to make a

charge for warehousing or storing of ordinary freight. If a particular shipper should demand elevation, the carriers could make a separate charge therefor in addition to the transportation rate, just as in the case of reconsignments, refrigeration, or storage, etc.,

In the case of ordinary freight would it be contended for a moment that a railway company could make an allowance to one or more shippers for removing and storing his own freight, in his own warehouse, should he conclude at some future day to ship the same out over other lines of railway to a new destination? Would not such a payment made in respect to freight transported over the line of railway be merely a device for a rebate or concession from the transportation charge in respect to such shipper? Is it not after all merely a device to simply reimburse the shipper from out of the freight charges and on account of services which the carrier was not obliged to render, but which the shipper rendered in respect to his own goods and for his own benefit?

It was further contended before the Commission by Peavey & Company that under the Hepburn Amendment to Section 15 of the Interstate Commerce Law such allowance might be made under the following provision:

> "If the owner of property transported under this act directly or indirecily renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable," etc.

It was contended that the elevator company might, therefore, as a shipper of grain, elevate its own grain into its own elevator at the termination of the carriage and for the purpose of its own storage and demand a reasonable allowance for such elevation.

But as we have shown heretofore, when the car of grain is set at the elevator or at such point on the tracks of the railway company that it may be conveniently unloaded, the transportation is ended, a delivery has been effected, and it is the duty of the shipper to unload or take away such freight. The statute is not to be construed as repealing the common law.

State v. *Shapiro*. 69 Atlantic, 340.
Langlois v. *Dunn Worsted Mills*, 57 Atlantic, 910.

In unloading and elevating the grain at the terminus of the haul the shipper renders no service connected with the transportation for which he should be allowed a reasonable or indeed any compensation to be deducted from the transportation charge or rate. The provision in question must be read rather as a limitation upon the amount of compensation which a carrier may allow to a shipper in case it should become necessary for the carrier in order to transport the freight to use an instrumentality necessary therefor furnished by the shipper as certain kinds of cars, or to accept some service rendered by the latter connected with the transportation of his property. The purpose of the Hepburn Law was but to strengthen those provisions of the Interstate Commerce Law which were aimed at

the extermination of unjust discriminations or the giving of undue preferences or advantages to certain shippers over their competitors. To more completely accomplish this end Section 6 was further amended by requiring the carriers in their tariffs to state separately from the established transportation rates all terminal and storage charges and all privileges or facilities granted or allowed and the rules or regulations which in anywise change, affect or determine any part or the aggregate of the rates, fares or charges required to be established or the value of the service rendered to the shipper or consignee.

The Commission found that the arrangement with the elevator company by which it received an allowance for services rendered in respect to its own property and for its own benefit, did give the elevator company, as shipper and dealer in grain, an undue advantage over other shippers and dealers in grain; and of the correctness of that conclusion, both as a matter of fact and of law, there ought not to exist any serious doubt. While the question as to what constitutes an undue preference or advantage in favor of one shipper as against another frequently involves a question of fact depending upon the particular circumstances disclosed by the evidence, the ultimate conclusion no doubt also involves an application of legal principles involved in a proper construction or application of the statutory provision. An advantage which is given to one shipper in the way of an allowance for services rendered in his own behalf in respect to the freight

after the transportation has ended is unwarranted, unjustifiable and wholly gratuitous and that shipper has in the end secured his transportation at a less charge than his competitors were obliged to pay, since under such an arrangement his competitors would not be able to avail themselves of such an allowance.

Respectfully submitted,

ROBERT DUNLAP,
Attorney for The Atchison, Topeka and Santa Fe Railway Company.

GARDINER LATHROP,
Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 287.

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY and MIDLAND ELEVATOR COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

MEMORANDUM FOR APPELLANT.

Since 1899 the Union Pacific Railroad Company has had contracts with the appellees, Omaha Elevator Company and Midland Elevator

Company, which are controlled by the appellee, F. H. Peavey & Company, for the payment of an allowance for the elevation of grain transported over its lines and delivered to the elevators of those companies at Council Bluffs and Kansas City, respectively (Record, pp. 5, 6, 7). By order of the Interstate Commerce Commission dated April 9, 1907, effective June 1, 1907, the amount of the allowance was reduced from one and one-fourth cents per hundred pounds, the contract rate, to three-fourths of a cent per hundred pounds, because it was deemed that the interest of Peavey & Company in both the grain and the elevators required that the allowance for elevation should be limited to the actual cost of the service (pp. 9, 10, 30). By order of the Commission, dated June 29, 1908, effective forthwith, the appellant was required to cease and desist from paying *any* allowance for the elevation of the grain of Peavey & Company at the elevators controlled by them unless such grain was reshipped within ten days and was not mixed, treated, weighed or inspected in the elevator, this upon the theory that the opportunity enjoyed by Peavey & Company to treat, etc., the grain in the elevators rendered any allowance to them for elevation a rebate and a preference (pp. 10, 40). The appellant paid

the contract allowances until the effective date of the order of April 9, 1907, and thereafter paid such allowances at the reduced rate fixed by the Commission until the date of the order of June 29, 1908 (p. 7). Since that time no payment has been made for the services performed by the elevators of appellee companies (p. 11). Effective June 27, 1906, the appellant by tariff No. 888 extended the elevation allowance of one and one-fourth cents per hundred pounds to all elevators at Omaha, South Omaha, Council Bluffs and Kansas City, which could comply with the conditions named in the tariff as to prompt return of cars (pp. 121, 141). Pursuant to the aforesaid order of the Commission, dated April 9, 1907, this tariff was superseded by tariff No. 904, effective June 1, 1907, reducing the allowance to three-fourths of a cent per hundred pounds (pp. 121, 142). After the entry of the aforesaid order of the Commission, dated June 29, 1908, the appellant superseded its then existing tariff by tariff No. 925 which continued the offer of the elevation allowance in recognition of its supposed contract obligations, confined, however, to the elevators located at the termini or upon the tracks of the Union Pacific at Council Bluffs and Kansas City, but, in deference to the de-

cision of the Commission, provided that the allowance would not be paid until the court of last resort had determined the liability therefor (pp. 11, 122, 143). The complainants thereupon brought the present suit against the Interstate Commerce Commission and the Union Pacific Railroad Company, praying that the 1907 and 1908 orders of the Commission be set aside and their enforcement enjoined, that the elevation contracts between the Union Pacific and the appellees be declared legal, valid and binding, and that the Union Pacific be required to pay the arrears of the contract allowances accrued since June 29, 1908 (pp. 11 and 12). The Union Pacific filed an answer (pp. 57 to 60) admitting substantially all the allegations of the bill of complaint, and also a cross-bill (pp. 113 to 125) praying that the elevator contracts be cancelled and set aside if the court found them to be illegal or to work a discrimination against the competitors of the complainants. The Circuit Court was of the opinion that the prohibition of all elevator allowances was beyond the delegated power of the Commission and entered its decree setting aside, suspending and annulling the order of June 29, 1908, and awarding to the complainants against the

Union Pacific the elevation allowance at the rate of one and one-fourth cents until the order of April 9, 1907, and thereafter at the rate of three-fourths of a cent (pp. 305, 332). From this decree the Union Pacific perfected an appeal separate from that of the Interstate Commerce Commission (pp. 306 to 309).

We are content to submit the questions involved for the determination of the Court upon the briefs and arguments of the counsel for the other parties in this case and in Nos. 285 and 286. The Union Pacific in this case is virtually in the position of a stakeholder. Under its contracts and the tariffs based thereon it is obligated to pay the appellees certain allowances for the elevation of grain. It has filed a cross-bill and taken a separate appeal in order that all questions may be preserved for determination, but it has no disposition to escape from its obligations if the Court holds the contracts to be valid. If however this Court holds that payment of elevator allowances to the owners of grain elevated is illegal, whether made under contract or otherwise, the Union Pacific will cancel the tariff extending such elevator allowances.

This case is intimately related to the Updike

cases, Nos. 353 to 356, which have been advanced for hearing with this case. We wish to advert briefly to the predicament in which the Union Pacific has been placed by the decisions below in this case and in the Updike cases. Although the Circuit Court in the present case (three judges sitting) has sustained the right of the Peavey elevators to recover from the Union Pacific the elevator allowances provided by the contracts and the tariffs based thereon, the Circuit Court of Appeals in the Updike cases has held that the payment of elevator allowances to the contract elevators in strict conformity to the tariffs and contracts discriminated against the Updike and other elevators which were not so situated that they could comply with all the conditions of the tariff, and reparation has been awarded accordingly. The result of the decisions below, therefore, is that the Union Pacific must abide by its contract obligations to pay elevator allowances to the Peavey elevators, since their contracts are valid, and cannot withdraw the tariffs based thereon, but that the payment of such allowances, nevertheless, operates as a discrimination against other elevators in the same localities, renders the Union Pacific liable

to make reparation to such other elevators for alleged past discrimination, and requires it to extend an elevator allowance in the future for an indefinite period to such other elevators. And further, since it has been held a discrimination to enforce against these other elevators the tariff condition that cars shall be returned within 48 hours, the elevator allowance extended to them in the future must omit this condition and be granted, therefore, upon more favorable terms than the allowance to the contract elevators. Since the contract elevators will not care to suffer such a discrimination against them, the condition as to return of cars will necessarily be annulled in their case also, and consequently the railroad company will have been entirely deprived of the benefit of the substantial consideration upon which its contracts and tariffs are based.

We beg to refer to our brief in the Updike cases for a more complete statement of the embarrassment suffered by the Union Pacific under the decisions below. We submit that the Peavey cases and the Updike cases should be considered together, and that the result of the decisions in both should be, either (1) that the contract elevation allowances to the Peavey elevators are

illegal and that the Union Pacific should not be judicially required to pay similar illegal allowances to the Updike Company, or (2) that the Peavey contracts are legal but that the Union Pacific is under no obligation to extend the same contract privileges to the Updike elevator whether or not the Updike elevator can perform exactly the same service therefor.

Respectfully submitted,

MAXWELL EVARTS,

F. C. DILLARD,

HENRY W. CLARK,

Of Counsel for Appellant Union Pacific Railroad Company.

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Supreme Court, U. S.
FILED
OCT 6 1913
JAMES H. McKENNEY
Clerk

In the Supreme Court of the United States.

October Term, 1913.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

v.

HARRY J. DEVENDORF, Receiver of the Kansas City, Clay County & St. Joseph Railway Company, et al., Appellees.

No. [illegible].

THE INTERSTATE COMMERCE COMMISSION, Appellant,

v.

[illegible]

No. [illegible].

[illegible]

[illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION, Appellant,
v.
HARRY J. DIFFENBAUGH, EDMUND D. Bigelow, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City et al., Appellees.
} In Equity, No. 285.

THE INTERSTATE COMMERCE COMMISSION, Appellant,
v.
F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and Midland Elevator Company, Appellees.
} In Equity, No. 286.

UNION PACIFIC RAILROAD COMPANY, Appellant,
v.
F. H. PEAVEY & COMPANY, OMAHA ELEVATOR COMPANY, and Midland Elevator Company, Appellees.
} In Equity, No. 287.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These cases come here by appeal from final decrees of the Circuit Court for the Western Division of the Western District of Missouri, enjoining enforcement

of two orders of the Interstate Commerce Commission dated June 29, 1908, and requiring the Union Pacific Railroad Company to pay to the appellees in the Peavey case the aggregate sum of $8,332.50, together with certain costs in the circuit court. The material portion of the order in the Peavey case is:

> It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required forthwith to cease and desist for a period of two years from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs (or on grain so received in any of said elevators in which they have any direct or indirect ownership or interest) that is not reshipped out of said elevators within ten (10) days after it has been received therein; and to cease and desist from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs. (Peavey Rec. 40.)

And the body of the order in the Diffenbaugh case reads:

> These cases being at issue upon complaints and answers on file, and having been fully heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, be, and they severally are hereby, notified and required to cease and desist, on or before the first day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying ¾ of 1 cent per 100 pounds or any other sum as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines, or points or places in territory adjacent thereto. Tariffs withdrawing said allowance may be made effective upon thirty days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and numbers of these cases. (Diffenbaugh Rec. 140.)

The orders were made to remove a discrimination which results from the payment by common carriers at the Missouri river of what are known as elevator allowances, and the carriers' refusal to pay either similar allowances or any allowances at all at other points. The allowances are paid on grain shipped from points of origin in Kansas and Nebraska to and beyond the river, and transferred through elevators

at the river, about 90% of which has its final destination at points north, east and south of the river.

The discrimination had its beginning in a contract dated February 7, 1899, entered into by and between the Union Pacific on the one hand and F. H. Peavey, who was then the senior member of the firm of F. H. Peavey & Company, on the other hand; and in and by said contract it was provided among other things that Peavey should erect an elevator at Council Bluffs; that the Union Pacific "will deliver to said elevator all grain originating on its lines and transported thereover, which may be consigned to or in care of said elevator, and will pay to Frank H. Peavey, or his assigns, on all such grain transferred through said elevator, a transfer charge not exceeding $1\frac{1}{4}$ cents per hundred pounds, during the first ten years of this contract, and not exceeding 1 cent per hundred pounds thereafter, but at no time shall the transfer charge herein provided to be paid exceed such transfer charge as is customarily made on similar business at similar points." (Peavey Rec. 127–129.)

In pursuance of this contract the elevator was completed in the summer of 1899, and has been in operation since that time. While the elevator was in process of construction, or soon afterwards, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Elevator Company, a corporation which was organized for the purpose of acquiring the elevator, plant and business; and which has since owned and conducted the same.

This involved no substantial change of proprietorship, as a controlling interest in the stock of the corporation has always been owned by members of the firm of Peavey & Company. (Peavey Rec. 16.)

Afterwards by verbal arrangement the terms of the Peavey contract, so far as payment of elevator allowances by the Union Pacific is concerned, were extended to the Midland Elevator Company, a corporation whose capital stock is substantially all owned by individual members of said firm. The Midland Company operates an elevator located at Kansas City, Kansas, which is commercially the same as Kansas City, Missouri. (Peavey Rec. 16–17, 190.)

After the terms of the Peavey contract became known to the carriers who were in competition with the Union Pacific, the former made complaint to the Commission and represented that the payments made by the Union Pacific secured to Peavey & Company undue preference and advantage and subjected other shippers to undue prejudice and disadvantage. (Peavey Rec. 17.)

Whereupon the Commission on its own motion instituted an investigation and on June 25, 26, and 27, 1903, held hearings and received evidence at Chicago. (Peavey Rec. 185, et seq.)

On June 25, 1904, as a result of said investigation, the Commission made a report in writing wherein it stated: that no shipper had made complaint in the premises; that the good faith of the Union Pacific in entering into said contract had not been impeached; that it was a benefit to the Union Pacific to have

the grain transferred from its cars to the cars of its connections at Council Bluffs and Kansas City; that the probable effect of said payment was to secure to Peavey & Company important advantages over their competitors, and that said payments were more than sufficient to pay all the expenses of operating said elevators, including taxes and insurance on and maintenance and repairs of the buildings, but not more than a reasonable compensation for the transfer services performed by the Peavey companies.

And the Commission held that the Union Pacific had a right to perform said transfer services itself, by its own agencies and employes, or hire a shipper to do so; that such right was not affected by the fact that a shipper so hired would thus secure important advantages over his competitors, unless the payments were more than reasonable compensation for the services performed; and that under the circumstances disclosed by the record, the payments made as aforesaid under said contract did not constitute a violation of the act to regulate commerce. (Peavey Rec. 20–25.)

At first the payments were confined to grain transferred through the elevators of the Omaha Company and Midland Company, but on August 1, 1905, a contract was entered into by and between the Union Pacific and the Trans-Mississippi Grain Company, in pursuance of which like payments were afterwards made to the latter company. (Peavey Rec. 134–139.)

The Trans-Mississippi Grain Company is controlled by the Union Pacific and five other carriers who operate lines to and from Council Bluffs. (Peavey Rec. 190.)

Meanwhile many new elevators had been erected at Omaha, South Omaha, Council Bluffs and Kansas City. (Peavey Rec. 226, 252–253.)

And by schedule issued on June 27, 1906, and made effective the same day, the Union Pacific agreed to extend the payments under certain conditions to all elevators located at the latter points. (Peavey Rec. 141–142.)

Upon the hearings at Chicago, in 1903, representatives of the carriers competing with the Union Pacific advised the Commission that they would be obliged to pay elevator allowances similar to those paid by the Union Pacific if the latter were sustained and held to be lawful. (Peavey Rec. 18–28.)

But it will be observed that in its decision of June 25, 1904, the Commission treated the allowances paid to the Peavey companies as incidental only, and expressed the opinion that in the absence of a showing that the payments made, when measured by the services to which they pertained, were excessive, the Commission was without power to remove the discrimination complained of, although that discrimination secured to the Peavey companies an advantage over their competitors.

On February 19, 1906, however, this court rendered a decision in the case of *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Com-*

mission, 200 U. S. 361, which indicated that the Commission's conclusions concerning its power under the Act to remove harmful discriminations were erroneous. In that case the court, speaking through Mr. Justice White, the present Chief Justice, said:

> The interstate commerce act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them. Its prohibitions against directly or indirectly charging less than published rates are all-embracing and applicable to every method by which the forbidden results could be brought about. (Syllabus.)

Also, on June 29, 1906, certain amendments to the Act were made by what is known as the Hepburn law. In Section 1 the term "transportation" was so amended as to include "transfer in transit," "storage," and "elevation," and in Section 15 a new paragraph was inserted, which reads as follows:

> If the owner of property transported under this act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order

> shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

As a result of the demoralization in the grain business and the serious consequences to carriers competing with the Union Pacific which followed the Commission's decision of June 25, 1904, such competing carriers appealed again to the Commission; and in July, 1906, the Commission reopened the proceedings before it and made another and very extensive investigation. Hearings were held at Chicago on September 17 and 18, and October 1, 2, 3, 4 and 5 of that year. (Peavey Rec. 26, 209 et seq.)

As a result of the second investigation the Commission found that the payment of 1¼ cents per 100 pounds was excessive. In this connection the language of the Commission was:

> Granting, then, that the allowances were not shown to be excessive upon the prior investigation, do they now appear to be unreasonable in the light of all the facts and circumstances disclosed upon the rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction. (Peavey Rec. 29.)

The Commission also found that the payment of 1¼ cents per 100 pounds was greater than the cost of the service performed by Peavey & Company to the extent it exceeded ¾ of a cent per 100 pounds,

and to that extent operated as a rebate and gave to the owners of the grain an advantage over their competitors. (Peavey Rec. 29–30.) Thereupon the Commission issued an order dated April 9, 1907, the body of which reads as follows:

> It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required to cease and desist, on or before the 1st day of June, 1907, and for a period of at least two years thereafter abstain, from giving or paying 1¼ cents per 100 pounds as and for an allowance or compensation for service rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs, in the State of Iowa, or Kansas City, in the State of Missouri, or points or places in territory adjacent thereto, to any person, firm, association, company, or corporation, directly or indirectly, engaged or interested in the buying, selling, or shipment of grain, or to any elevator company or corporation owned in whole or in part, or in anywise, directly or indirectly, controlled by one or more such persons, firms, associations, companies, or corporations so engaged or interested directly or indirectly, in the buying or selling of grain; and more particularly to so cease and desist from giving or paying such allowance to the Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Company; and to further cease and desist at the time and for the period aforesaid from giving or paying any allowance or compensation for such service in excess of three-fourths of a cent per 100

> pounds of grain, to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Company, or to any person, firm, association, company, or corporation, directly or indirectly engaged or interested in the buying, selling, or shipment of grain at the places aforesaid or adjacent thereto, or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled, by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling, or shipment of grain. (Peavey Rec., 30.)

Commissioner Cockrell did not participate in the decision rendered on April 9, 1907, and dissenting opinions were written by Commissioners Clements and Lane. (Peavey Rec., 30–35.)

It appears that at the time the order of April 9 was made and entered the Commission was of the opinion that a carrier's right to pay a shipper for the services performed by the latter for the carrier was limited by the prohibitions contained in Sections 2 and 3 of the Act, but thought that if the payments were limited to the cost of the services performed, unjust discrimination, undue preference, or undue prejudice could not arise. (Peavey Rec., 29.)

It will be seen, however, that concerning the latter point subsequent experience caused the Commission to change its opinion. In this connection the views of the Commission and the contentions of complainant parties are so succinctly and clearly stated in a supplemental report of the Commission written by Com-

missioner Harlan that we think best to and do insert here in full the body of said report.

> From numerous protests and complaints that have reached the Commission since the handing down of its last decision in this proceeding on April 9, 1907, it is apparent that there has been a wide extension among interstate carriers of the payment of the so-called elevator allowances on shipments of grain, and that there is a general feeling that the practice results in an unlawful discrimination. The Chicago Board of Trade and other interests largely concerned in the shipment of grain have asked for the further consideration of the matter. Under these circumstances we have concluded in the public interest to reopen the proceeding and to set it down for further argument on May 8 next in the hearing room of the Commission at Washington. Of this action the parties hereto have already been advised. It seems unnecessary to take further evidence and the matter will therefore be considered on the present record. It is the desire of the Commission that counsel shall again argue the general question of the legality of the contract of the Union Pacific Railroad Company with Peavey & Company and the lawfulness of the allowances that are made to the latter company at Council Bluffs and Kansas City under the terms of that contract.
>
> In connection with the reexamination of these general questions the Commission desires the benefit of the views of counsel with respect to two points which have been strongly

urged upon its attention and which may be stated briefly as follows:

1. The clipping, cleaning, grading, weighing, and mixing of grain are services that have no relation to transportation, but are of commercial advantage to the shipper of the grain. If performed or paid for by a carrier at one place where it has put an elevator under contract, as with Peavey & Company at Council Bluffs and Kansas City, is it not an unlawful discrimination not to perform or to pay for similar services elsewhere on its line?

2. Wheat and other grains are dealt in upon the great grain markets of the country on fractions as small as one-eighth of one cent per bushel. A fluctuation of that amount often suffices to effect or prevent sales. And slight differences in the transportation rates are sufficient to turn a movement of grain from one market to another. In other words, no commodity that enters so largely into the commerce of the country is more sensitive than grain to fluctuations in price or rates. If therefore a shipper receives from a carrier, in connection with the transportation of his grain, any service or privilege that results in a benefit to him to the extent even of a small fraction of a cent per bushel, it gives him an advantage which can readily be turned to his profit. While some grain is taken directly to the mills, the bulk of the traffic must pass either through public or private elevators. A grain market can be maintained only by the use of elevators. A grain dealer must therefore have his grain unloaded into a public

elevator and pay its storage charges, or must handle it in his own elevator and pay the cost of operation. In other words, Peavey & Company, for the successful conduct of their business as dealers in grain, must either use a public elevator or provide themselves with one of their own. In either event a substantial expense item is involved. Upon these facts it is insisted that a contract, such as the one here involved, when made with a dealer in grain who handles his own wheat, results in an unlawful discrimination, whatever may be the amount of the allowance and whether it be in excess of the cost of the service or not; for, as Peavey & Company can not conduct their business as grain buyers and dealers without using a public elevator and paying its charges, or without owning their own elevator and paying the cost of operation, any amount, be it small or large, contributed by the Union Pacific Railroad Company to the cost of running their elevator must necessarily operate, pro tanto, as a special concession in their favor. It is contended that any aid received by them from the Union Pacific Railroad Company, whether sufficient to cover the cost of running the elevator or not, even though it amounts to but a small fraction of a cent per bushel, really results in giving to Peavey & Company a benefit which, although under the present tariffs of the Union Pacific Railroad Company is shared by other grain dealers in business at Council Bluffs, Omaha, and Kansas City, is nevertheless denied to grain dealers at other points on the line of that company. Such

dealers have to bear the entire burden of running their elevators, or pay for the elevation service on their grain when performed by a public elevator. And this, it is earnestly contended, is not only an unlawful discrimination against them, but against the several communities in which they conduct their grain business.

In rearguing the issues herein, counsel are requested to give some consideration to these suggestions.

In accordance with the notice contained in said supplemental report counsel for the interested parties appeared before the Commission and submitted further arguments in the premises, and after listening to such arguments, and considering the same in the light of the Commission's experience concerning transfer or elevator allowances paid by carriers on, and free transfer by carriers of, grain transferred through elevators at different points, and after a reexamination and careful reconsideration of the record in said case, the Commission concluded that, in connection with the interstate transportation of grain, any payment of a transfer or elevator allowance or any free transfer made under such circumstances, that the owner of the grain, or any party interested therein, was enabled to and did, while the transfer was being made, either by himself or some one acting in his behalf, inspect, clip, clean, mix, or otherwise treat the grain, constituted an unjust discrimination, gave to such owner or interested party undue and unreasonable preference and advantage, and sub-

jected other parties who did not receive such transfer or elevator allowance or free transfer to undue and unreasonable prejudice and disadvantage, and, in accordance with such conclusion, issued said order of June 29, 1908.

All the members of the Commission participated in the report which formed the basis for the order last above mentioned, but at the close of said report this paragraph appears:

> Prouty, Commissioner, concurs in the result and Lane, Commissioner, concurs in the conclusion that the allowance is unlawful. (Peavey Rec. 39.)

After said order of June 29 was issued, the Union Pacific canceled the schedule extending payment of the allowance to all elevators located at Omaha, South Omaha, Council Bluffs and Kansas City, and published and filed in lieu thereof, effective on said June 29, a schedule confining such payment to elevators located on the tracks of the Union Pacific at Council Bluffs, Iowa, and Kansas City, Kansas, but providing that no payment shall be made unless and until the court of last resort determines that such payment is proper. (Peavey Rec. 143–144.)

After the Commission's decision of April 9, 1907, was published, carriers who serve points on the Missouri river and also serve St. Louis, published and filed schedules under which they discriminated against the latter point by paying elevator allowances at points on and adjacent to the river and refusing to pay similar allowances at St. Louis; that is to say,

on grain shipped from points of origin in Kansas and Nebraska which had its final destination at St. Louis and other points east of the river, an allowance of ¾ of a cent per 100 pounds was paid where the grain was elevated en route at the river, but no such allowance was paid where the grain was put into an elevator at St. Louis. In consequence of this discrimination the Traffic Bureau, Merchants Exchange of St. Louis filed five separate complaints in the Commission's office: one against the Chicago, Burlington & Quincy Railroad Company, another against the Missouri Pacific Railway Company, another against the Chicago, Rock Island & Pacific Railway Company, another against the St. Louis & San Francis o Railroad Company, and another against the Missouri, Kansas & Texas Railway Company, and alleged that the matters complained of constituted a violation of Sections 2 and 3 of the Act. (Diffenbaugh Rec. 17–21.)

A hearing was held in these cases, which were tried together, at St. Louis on October 23, 1907 (Diffenbaugh Rec. 227, et seq.), and the matters complained of were determined by the Commission at the same time it passed upon the issues involved in the Peavey case; and as a result the order in the Diffenbaugh case, dated June 29, 1908, hereinabove mentioned, was entered by the Commission and served upon the defendant carriers. Concerning the discrimination complained of in the St. Louis cases the Commission said: "Upon the facts now before us the granting of

free commercial elevation or the payment of an elevation allowance must be held an undue discrimination and therefore unlawful." (Diffenbaugh Rec. 137.)

In the Diffenbaugh case the material facts are substantially the same as those pertaining to the Peavey case, except that no contracts providing for the payment of elevator allowances were entered into between the grain dealers on the one hand and the carriers on the other. Also, while in the Peavey case the Union Pacific sought to justify the payments to the Peavey companies by showing they were made for the purpose of securing a release of equipment, which release was a benefit to the Union Pacific, in the Diffenbaugh case the carriers make no such claim; instead, in justification of the discrimination complained of, they contend that the payments made by the Union Pacific at Kansas City and Council Bluffs compel them to make like payments at those points and at other Missouri river points, but do not compel them to make similar payments or to pay any elevator allowances at St. Louis.

It will be observed that the order in the Diffenbaugh case differs somewhat from the order in the Peavey case, but the purpose of the former is exactly the same as the purpose of the latter. In the Peavey order the Union Pacific is prohibited from paying any allowance to Peavey & Company on grain they are interested in which is held in their elevators at Kansas City or Council Bluffs more than

ten days, or upon grain they are interested in which is mixed, treated, weighed, or inspected in any of said elevators; while in the Diffenbaugh case the carriers involved are prohibited from paying any sum "as an allowance or compensation for service rendered in the elevation of grain" at any of the Missouri river points or points adjacent to the Missouri river.

But in neither case has the Commission undertaken to prevent the carriers from providing suitable facilities for the transfer of grain from car to car in the course of its transportation, or from providing elevator facilities for the handling or storing of grain in transit. It has simply undertaken to prevent the carriers from paying elevator allowances, regardless of the name given to the payment made where, under actual operating conditions, the payment, in the opinion of the Commission, constitutes the unjust discrimination, undue preference and undue prejudice prohibited by Sections 2 and 3 of the Act.

At first the orders were made effective on different dates, but they were modified thereafter by the Commission and both made effective on July 1, 1909. This was done to enable the courts to determine whether the orders were valid before they were put in force. (Diffenbaugh Rec. 148.)

We believe the questions presented to the court for determination, so far as they relate to said orders, are the same in both cases, but the Diffenbaugh case includes also certain questions of jurisdiction. In the latter case the circuit court overruled a

demurrer filed on behalf of the Commission challenging the competency of the petitioners as such, and, over the objection of counsel for the Commission, allowed certain carriers to intervene on behalf of the petitioners.

The Diffenbaugh case was instituted in the circuit court by the Boards of Trade of Kansas City, St. Joseph and Atchison and the Grain Exchange of Omaha, and the carriers who were afterwards allowed to intervene in that case, as aforesaid, are: Chicago, Milwaukee & St. Paul Railway Company, Wabash Railroad Company, Chicago Great Western Railroad Company, and Chicago & Alton Railroad Company. (Diffenbaugh Rec. 284–285.)

The errors assigned and relied upon in the Peavey case are:

The Circuit Court erred in not dismissing the bill for want of equity.

The Circuit Court erred in ruling that the Commission has no power to require a carrier to cease and desist from paying to a party interested in grain an allowance for services rendered in connection with the transfer thereof from car to car through an elevator where the grain is cleaned, clipped, mixed or otherwise treated while being so transferred.

The Circuit Court erred in ruling that where a carrier transports in one of its own cars traffic destined to a point beyond the terminus of its own line of railway it has a right to insist that at such terminus the traffic shall be unloaded and the car released.

The Circuit Court erred in ruling that all services performed in connection with the elevation of property transported are transportation.

The Circuit Court erred in ruling that the discrimination disclosed by the record is authorized by law.

The Circuit Court erred in ruling that a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform said services, and regardless of discriminations which may result from such advantages.

The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 2 of the Act to regulate commerce.

The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 3 of said Act.

The Circuit Court erred in entering a decree annulling and enjoining enforcement of the order of the Commission. (Peavey Rec. 311.)

And the assignment of errors relied upon in the Diffenbaugh case is:

The Circuit Court erred in not dismissing the bill for want of jurisdiction.

The Circuit Court erred in not dismissing the bill for want of equity.

The Circuit Court erred in overruling the demurrer of the commission.

The Circuit Court erred in ruling that a party may institute and maintain in court a suit to suspend or set aside an order of the commission although he be not a party to the proceedings before the commission upon which the order is based, or a party to the order.

The Circuit Court erred in ruling that a party may intervene and become a party to a suit instituted in court to suspend or set aside an order of the commission, although he be not a party to the proceedings before the commission upon which the order is based or a party to the order.

The Circuit Court erred in ruling that the complainants have a legal interest in the subject matter of said order.

The Circuit Court erred in ruling that the complainants have an interest in the subject matter of said order which can be enforced in this suit.

The Circuit Court erred in ruling that the intervenors have a legal interest in the subject matter of said order.

The Circuit Court erred in ruling that the intervenors have an interest in the subject matter of said order which can be enforced in this suit.

The Circuit Court erred in permitting the Chicago & Alton Railroad Company, the Chicago Great Western Railroad Company, the Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company to intervene and become parties to this suit.

The Circuit Court erred in ruling that the commission has no power to require a carrier to cease and

desist from paying an allowance or compensation for services rendered in the elevation of grain, under circumstances where, in the opinion of the commission, unjust discrimination, undue preference and undue prejudice can not otherwise be prevented.

The Circuit Court erred in ruling that where a carrier transports in one of its own cars traffic destined to a point beyond the terminus of its own line of railway it has a right to insist that at such terminus the traffic shall be unloaded and the car released.

The Circuit Court erred in ruling that all services performed in connection with the elevation of property transported are transportation.

The Circuit Court erred in ruling that the allegations in the bill that the order is beyond the power of the commission and will irreparably injure the property and business of the complainants constitute good ground for equitable relief.

The Circuit Court erred in ruling that the discrimination disclosed by the record is authorized by law.

The Circuit Court erred in ruling that a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform said services, and regardless of discriminations which may result from such advantages.

The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 2 of the act to regulate commerce.

The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 3 of said act.

The Circuit Court erred in entering a decree annulling and enjoining enforcement of the order of the commission. (Diffenbaugh Rec. 274–275.)

POINTS.

I.

THE CIRCUIT COURT ERRED IN HOLDING THAT THE COMMISSION HAS NO POWER TO REQUIRE A CARRIER TO CEASE AND DESIST FROM PAYING TO A PARTY INTERESTED IN GRAIN AN ALLOWANCE FOR SERVICES RENDERED IN CONNECTION WITH THE TRANSFER THEREOF FROM CAR TO CAR THROUGH AN ELEVATOR WHERE THE GRAIN IS CLEANED, CLIPPED, MIXED, OR OTHERWISE TREATED WHILE BEING SO TRANSFERRED.

In connection with the matters now under consideration, it will be seen that, including the dissenting opinions of Commissioners Clements and Lane, six different decisions have been written by five different commissioners, and we believe no one who examines those decisions carefully can fail to conclude that the Commission used its best efforts to uphold the Peavey contracts and the payments made thereunder by the Union Pacific, but was finally compelled to admit it could not do so and at the same time prevent the unjust discrimination prohibited by section 2 of the Act and the undue preference and undue prejudice prohibited by section 3 of the Act. At first it expressed the opinion that any payment was lawful if it did not exceed a reasonable compen-

sation for the particular service performed, but the injuries which resulted from this holding to the competitors of the Peavey companies were so great that the Commission felt compelled to and did modify its conclusion and held that in order to be within the law, the payments must in each instance be confined to the cost of the service performed. Subsequent experience, however, clearly demonstrated that neither of these holdings reached the root of the evil it was absolutely necessary to remove in order to avoid unjust discrimination, undue preference, and undue prejudice. The Commission saw from the beginning that if a carrier paid a shipper an unreasonable compensation for a service performed by him in connection with the transportation of his traffic, the shipper thus favored would thereby secure an unfair advantage over his competitors who did not receive a similar payment, but it did not see at first, although it finally discovered and observed very clearly that the evil complained of was caused, not so much by the amount of the payment made in each instance by the Union Pacific to the Peavey companies, as by the fact that while such service was being performed the Peavey companies, having possession of the grain, were able to and did inspect, clip, clean, mix, and otherwise treat it, and thereby secure great advantages over their competitors who were not in a position to take advantage of the privilege of having their grain handled through elevators at Council Bluffs or Kansas City.

It is apparent that the orders if allowed to have full force and effect will remove the discrimination complained of, but the Circuit Court said that in making the orders the Commission acted beyond its power:

(a) because where a carrier transports in one of its own cars traffic destined to a point beyond the terminus of its own line of railway it has a right to insist that at such terminus the traffic shall be unloaded and the car released (Diffenbaugh Rec. 279);

(b) because all services performed in connection with the elevation of property transported are transportation (Diffenbaugh Rec. 280, 287);

(c) because the discrimination disclosed by the record is authorized by law (Diffenbaugh Rec. 280, 287);

(d) because a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform such services, and regardless of discriminations which may result from such advantages (Diffenbaugh Rec. 288–289);

(e) and because the facts disclosed by the record do not show a violation of either section 2 or section 3 of the Act to regulate commerce. (Diffenbaugh Rec. 295.)

Section 7 of the Act reads:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

It is plain that if grain which originates at points in Kansas and Nebraska and is destined to points east of the Missouri river be transferred through an elevator at the river, there is a break of bulk, stoppage and interruption which prevents the carriage from being continuous from place of shipment to place of destination, and the record shows that at the time of the last hearing before the Commission in the Peavey case the Union Pacific equipment "passed freely onto the lines of other railroads and the equipment of other railroads moved freely over its lines." (Diffenbaugh Rec. 99.)

Also, the testimony of Mr. C. E. Spens, general freight agent of the Chicago, Burlington & Quincy Lines West of the Missouri river, indicates that three-fourths of the cars used by the Union Pacific for the transportation of grain over its lines of railway belonged to other carriers. He said he was unable to answer generally, but that "for two or three days noticed that perhaps conservatively 75% of the cars used by the Union Pacific handling grain was foreign equipment." (Peavey Rec. 229.)

Under these circumstances we think necessity for the interruption has not been shown, and the language of the Act seems to indicate that in the absence of such necessity the interruption would be unlawful.

However, the point is of no importance in these cases because there is nothing in the orders which prevents carriers from making such arrangements as will result in their cars being released at the carriers' termini. In this connection the Commission said:

> It is without doubt the right of the Union Pacific Company to provide at Omaha storage facilities into which its cars can be unloaded and thereby promptly released. That company may without question provide for the transfer of grain from its own cars to the cars of its connection when that is necessary to complete a through shipment. It can provide these facilities either by an outlay upon its own part or by contracting for the performance of the service at so much per bushel.

> This service pertains entirely to the transportation of the grain. The shipper has no possible interest in it, and it is entirely immaterial to him by what means that is effected, provided the service of transportation be properly performed. (Diffenbaugh Rec. 136–137.)

We have experienced some difficulty in determining what the circuit court had in mind when it said "All services in connection with the elevation of the property transported are transportation," (Diffenbaugh Rec. 280) and "Elevation is a part of the transportation which the law requires the carriers to provide and for which it authorizes them to pay others reasonable compensation," (Diffenbaugh Rec. 287) because the circuit court also said: "The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting, and grading of it is a trade service; it is no part of transportation and is not a transportation service." (Diffenbaugh Rec. 288.)

These matters, though, appear to be intimately connected with the court's holdings, that the discrimination disclosed by the record is authorized by law, and that a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform such services, and regardless of discriminations which may result from such advantages.

In accordance with stipulation of counsel for the parties, these cases were tried in the circuit court upon: evidence introduced before the Commission, an abstract of which was agreed upon, and the orders and opinions of the Commission, together with some other testimony and documentary evidence. (Diffenbaugh Rec. 149–153; Peavey Rec. 165, 181–183.)

The circumstances and conditions which prompted the action taken by the Commission are fully stated in the Commission's opinions, to which references have already been made, but we call the attention of the court especially to the opinion in the St. Louis cases which is in the nature of a recapitulation. (Diffenbaugh Rec. 120–138.)

The grain to which the orders in question relate is produced at points west of the Missouri river, in the States of Kansas and Nebraska, and nearly all consumed at points east of the river, although some of it is consumed at points on and west of the river. It is sold by weight, and the recorded weight of the particular lot or shipment must receive faith and credit wherever the grain goes. In order to secure an official weight, it is necessary to pass the grain through an elevator. Storage of the grain is also necessary, generally, between the time when the grain is harvested and the time when it is passed into the hands of the consumer; but to some extent shipments are made directly from the producer to the consumer and not stored at any point en route. As a practical matter, however, the grain must be and is handled by grain dealers, who purchase it at

points of production and store it for varying periods of time in elevators, where they clean, clip, mix and otherwise treat it.

Elevators for the storage, etc., of grain are located at different points throughout the United States, and the record in this case shows that several hundred are located on the lines of carriers here involved in Kansas and Nebraska, but the larger elevators are located at what are known as primary grain markets, such as Kansas City, Omaha, Council Bluffs, St. Louis and Chicago, where grain from many different points can be and is concentrated and where, therefore, the greatest profit can be and is derived by the grain dealers from mixing grain of different qualities. This profit ranges from one-half of a cent to five cents per 100 pounds. (Peavey Rec. 202, 203, 204, 216, 217, 219, 220, 223, 224, 232, 238, 268, 283, 284, 287.)

After grain is stored and mixed and otherwise treated in an elevator at one point, it may be and is sold for consumption or to be manufactured into products of different kinds at that point, or shipped to another point for such purposes or for further shipment.

Many elevators are located at milling points intermediate between points of production and markets of consumption, and used by millers for the storage of grain manufactured by them into flour and other grain products, which are afterwards shipped to such markets.

Elevators are therefore essential to the business of grain dealers, and while it may sometimes happen that the operation of an elevator is a convenience to and serves the interest of a carrier, the interest of a carrier when compared with the interest of a grain dealer or dealers in such operation is small, and elevators would be constructed, maintained, and operated in any event by grain dealers for their own benefit.

Transportation charges are assessed by the carriers in accordance with the weight of the grain transported, and it is said the weight can be most conveniently and accurately ascertained in elevators, and that, therefore, elevators are essential to the business of the carriers. To the grain dealer an official weight is a commercial necessity, but it is not necessary for the carrier to obtain an official weight, and, while the weighing of a carload of grain in an elevator may be a convenience to the carrier, this method of obtaining weights is no more necessary in connection with the transportation of grain than in connection with the transportation of hay, potatoes, or other similar articles of traffic.

To some extent, also, grain is handled by track buyers, so called, who purchase it while in the cars and on the tracks of the carriers at such primary markets and, without unloading it, ship it to other markets.

For the purpose of accommodating these different classes of grain dealers and shippers, and to preserve an equitable relation between the different primary

markets and milling points, and prevent rate cutting, the carriers named in the orders referred to and other carriers adjust their grain rates in such a manner, in each instance, that the aggregate of the in-and-out rates is the same as the through rate—that is to say, the through rate is made by adding to the rate from point of origin to a primary market or milling point the rate from such market or milling point to point of final destination. For example, if the natural route over a particular line of railway from a point of origin in Nebraska to St. Louis is via Council Bluffs, the through rate from said point of origin to St. Louis is the same as the aggregate rate made by adding to the rate from point of origin to Council Bluffs the rate from Council Bluffs to St. Louis. The latter rate is called a proportional rate. This enables the shipper to store, and mix and otherwise treat the grain in an elevator either at the point of origin, at Council Bluffs, or at St. Louis, without making any difference in the aggregate charge he is compelled to pay for transporting the grain from said point of origin to St. Louis.

Under these circumstances it will be seen that where an elevator allowance is paid, the payment has the same effect as would have the payment of a rebate. As a result, the net amount of transportation charges paid by a grain dealer who receives the allowance is the amount of the allowance less per 100 pounds in each instance than the net amount of transportation charges paid by other shippers who receive no elevator allowances. Since the elevation

and transfer of the grain are a commercial necessity and services grain dealers must perform and do perform for themselves at their own expense, where carriers do not pay a part of such expense, it is evident that where a grain dealer receives the benefit of a payment made by a carrier he thereby secures an advantage over his competitor to the full amount of the payment made.

We have seen that in justification for this discrimination the excuse advanced by the Union Pacific is a desire to secure prompt release of its equipment, while the excuse offered by other carriers is the necessity of meeting competition created by the Union Pacific.

If these defences are held to be good and sufficient, and the carriers see fit to and do continue the discrimination referred to, the purchase, shipment, and sale of grain grown in Kansas and Nebraska will be almost entirely confined to grain dealers who store, and mix and otherwise treat their grain in elevators located at Missouri river points. The evidence shows that on an average three-fourths of a cent per 100 pounds paid by the carriers is sufficient to pay the entire cost of operating an elevator. (Peavey Rec. 206, 229, 232, 242, 243, 261, 264, 285.)

The evidence also shows that one cent per bushel is considered by grain dealers a good profit for handling grain, and that oftentimes the profit derived by them for such handling does not exceed one-eighth of a cent per bushel. (Peavey Rec. 223, 230, 241, 285.)

It may be said that although the carriers can not be compelled to remove the discrimination in question, they may voluntarily do so by paying at other points an elevator allowance equivalent to that paid by them at Missouri river points, and thus render impossible the monopoly above mentioned; but this is only another way of saying that the enforcement of the prohibition against undue preference and undue prejudice contained in section 3 of the Act depends upon the will of the interested carriers.

As above shown, in section 1 of the Act "transfer in transit," "storage," and "elevation" are included in the term transportation, and it is provided that the transportation described in the section shall be furnished, upon reasonable request therefor, by every common carrier subject to the provisions of the Act. Also in section 15 it is provided that if the owner of property transported renders a service or furnishes a facility in connection with the transportation, the Commission may, after hearing upon a complaint, determine the reasonable maximum charge to be paid by the carrier therefor, and, by appropriate order, prohibit a carrier from paying any sum in excess of such maximum charge. And, based upon these provisions, the contention of appellees which has been upheld by the circuit court is that the payment of three-fourths of a cent per 100 pounds is authorized by law, and in the absence of proof that the payment is more than a reasonable compensation for the services performed and facilities furnished, can not be held to be unlawful. This, however, is equivalent

to saying that certain provisions of the law may be seized upon and used, regardless of other provisions of the same law, to justify inequalities in the treatment accorded by carriers to shippers, while this court, in speaking of the interstate commerce law as a whole, has repeatedly said that it was enacted for the purpose of preventing such inequalities.

Interstate Commerce Commission v. *Baltimore & Ohio Railroad Co.*, 145 U. S. 263, 277;

Union Pacific Ry. Co. v. *Goodridge*, 149 U. S. 680, 690;

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184, 197;

Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 219;

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 506;

Wight v. *United States*, 167 U. S. 512, 518;

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 172;

East Tennessee, Virginia & Georgia Ry. Co. v. *Interstate Commerce Commission*, 181 U. S. 1, 18;

New York, New Haven & Hartford R. R. Co. v. *Interstate Commerce Commission*, 200 U. S. 361;

Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U. S., 426, 439;

Interstate Commerce Commission v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 119;

Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452, 477;

Interstate Commerce Commission v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235, 253.

In the Peavey contract referred to, the payment under consideration is described as a payment for a "transfer service," but in fact it is an elevator allowance, which includes many other services, and is so regarded by the carriers. In this connection we quote from the tariff of the Chicago, Burlington & Quincy Railroad Company as follows:

> On grain and seeds shipped via the Chicago, Burlington & Quincy Railroad, or Quincy, Omaha & Kansas City R. R., transferred through elevators at points named in list below, these companies will pay cost of transfer and such service as elevator doing the transfer includes in that service, not to exceed three-quarters ($\frac{3}{4}$) of one cent per 100 pounds, when destination is point on the Mississippi River (or points west thereof taking same rates) or beyond.
>
> Transfer points above referred to: Council Bluffs, Iowa; St. Joseph, Mo.; Nebraska City, Neb.; Omaha, Neb.; Atchison, Kas.; Rulo, Neb.; South Omaha, Neb.; Leavenworth, Kas.; Lincoln, Neb.; Kansas City, Mo.; Elwood, Kas. (Diffenbaugh Rec. 260.)

And from the tariff of the Missouri Pacific Railway Company as below:

> On shipments of grain and seed, carloads, shipped via the rails of these companies, transferred through elevators at Omaha, South Omaha, Nebraska City, Neb.; Council Bluffs, Iowa; Atchison, Elwood, Leavenworth, Kan-

> sas City, Coffeyville, Kan.; Kansas City and St. Joseph, Mo., these companies will pay the cost of transfer (and such other services performed by the elevator included in such charge), not to exceed three-fourths of one cent per 100 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking same rates, or beyond; to points in Arkansas, Louisiana, Texas, and Mexico, provided no previous payment for similar service at the same point has been made thereon. (Diffenbaugh Rec. 269.)

Between the time when the grain is loaded into the elevator from one car and the time when it is loaded out of the elevator into another car, it is stored for periods of time which vary in accordance with the wishes and convenience of its owner, and many other services pertaining to the grain are performed in the elevator which do not benefit the carrier at all, but are of great advantage to such owner, and these are the circumstances which cause the allowance made to be an undue preference to shippers who receive the benefit of it. If while grain is being so transferred, it is not stored as aforesaid and the owner is not permitted to clean, clip, mix, or otherwise treat it, or to have that service performed in his behalf by some third party, there will be no undue preference or undue prejudice, unless the compensation paid by the carrier for the transfer is unreasonable; but, since as a commercial proposition grain must be stored in elevators as above, and weighed, inspected, clipped, cleaned, mixed, and otherwise treated there, and can

not be so stored, etc., unless it is transferred from car to car through an elevator, any sum paid by a carrier for such transfer, where the transfer is performed in connection with the other services mentioned, regardless of whether or not the payment is more than a reasonable compensation for the transfer services, gives to the owner of the grain an advantage over his competitors who do not receive a like payment. Of course the greater the payment the greater the advantage, but where, as above stated, it often happens that the profit of the grain dealer is not more than one-eighth of a cent a bushel, it is evident that even a small payment produces a harmful discrimination.

It can not be said that the payment results from circumstances over which the carrier has no control, because, even though it may be necessary for the carrier to transfer grain from car to car, it is not necessary for the carrier, while the transfer is being made, to permit the owner of the grain, either by himself or by a party acting in his behalf, to mix the grain with grain of a different quality or perform any other services beneficial to the owner but of no consequence whatever to the carrier. To say that under these circumstances the proper method of procedure would be to make an order against the grain dealer requiring him to cease and desist from treating the grain as above while it is being transferred from car to car through an elevator would be to say in effect that the remedy provided should be one which it would be impossible to enforce. The evil complained of is one which results from things

the carriers permit to be done while the grain is in transit from point of origin to point of final destination, and things which could not be done without the acquiescence and even the cooperation of the carriers; therefore any order made for the purpose of removing the evil should be and must be directed against the carriers.

It is said that a payment made by one carrier compels another carrier to make a similar payment. For instance, the carriers named in the order pertaining to the Diffenbaugh case say the payments made by the Union Pacific at Council Bluffs and Kansas City oblige them to make like payments at those points and at other Missouri River points, and it is undoubtedly true that if the Union Pacific is permitted to continue such payments and other carriers do not make similar payments, the former will have an advantage and obtain for transportation grain which would otherwise be transported by the latter. However, while the other carriers might be justified in meeting such competition, it is evident they could not be compelled to do so, and, if they did not, much harmful discrimination between shippers and between localities might result. One carrier might think best to meet the competition and another decide not to do so, while a third might come to the conclusion that its interests would be best served by meeting the competition at some points on its line and declining to do so at other points. Also, if it were determined that no relief could be granted to a party discriminated against, except where it was established that the pay-

ment made was more than reasonable compensation for the services performed, the chances of obtaining relief would be very remote, because it is evident that the cost of the transfer service would be greater at one point than at another, and greater at one time than at another at the same point, depending upon a multitude of circumstances concerning which it might be impossible to obtain definite information.

These difficulties are not imaginary; they are real, and experience with them for several years has caused the Commission, contrary to its first impression, as above shown, to conclude that the prohibition against undue preference and undue prejudice contained in section 3 can not be enforced unless the carriers can be compelled to separate the interest they have in securing the release of their equipment from the interest grain dealers whose shipments of grain are transferred through elevators have in cleaning, clipping, mixing, and otherwise treating the grain, while it is being so transferred. The orders under consideration, if permitted to have full force and effect, will render impossible the discrimination referred to, but we believe it would not be possible for orders less comprehensive to produce that result.

If such separation can not be required, it is apparent that at any time any carrier may make such an arrangement as will enable a favored shipper to practically monopolize a particular business in certain territory, by connecting its own interest with the interest of the shipper and paying the shipper for performing a service which, from the standpoint of

the carrier's interest, is either a necessity or a convenience.

We have seen that at first payments made by the Union Pacific were confined to elevators operated by the Omaha and Midland companies, and that afterwards they were extended to the Trans-Mississippi Grain Company, which operates at Council Bluffs an elevator owned by six of the interested carriers, but this gave those companies such an advantage over their competitors that the payments were afterwards extended to all operators of elevators located at Omaha, South Omaha, Council Bluffs and Kansas City. At the present time, however, it is provided in the tariff of the Union Pacific that the payment of three-fourths of a cent per 100 pounds shall be confined to cases where the grain originates west of the Missouri river on the line of the Union Pacific, is transported by that carrier to Council Bluffs or Kansas City, is transferred through elevators located on the tracks of the Union Pacific at the latter points, and is afterwards shipped to points east of the river. It is also provided in said tariff that, "No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made;" and since the rates on grain from points of origin west of the river to Council Bluffs and Kansas City, respectively, are the same in each instance, regardless of the location of elevators into which the grain is unloaded at the latter points, it is evident that if this court determines that the payment provided for in said tariff is lawful and may

properly be made, operators of elevators located at Omaha, South Omaha, Council Bluffs and Kansas City on tracks other than those of the Union Pacific and owners and shippers of grain transferred through such elevators will be prejudiced to the extent of three-fourths of a cent per 100 pounds, while their competitors whose grain is transferred through elevators located on the tracks of the Union Pacific will be correspondingly preferred.

We have shown that as between two grain dealers who do no manufacturing, one of whom uses an elevator located at Council Bluffs and the other of whom uses an elevator located at St. Louis, there is a discrimination of three-fourths of a cent per 100 pounds; that is to say, although the grain dealers buy their grain at the same point west of the Missouri river, ship it via Council Bluffs to St. Louis, and sell it at the latter point, the net amount of transportation charges paid by the shipper and received and retained by the carriers where the grain is passed through an elevator at Council Bluffs is three-fourths of a cent per 100 pounds less than the net amount of transportation charges paid by the shipper and received and retained by the carriers where the grain is passed through an elevator at St. Louis. But for the purpose of indicating further the far-reaching, injurious and demoralizing effect of the discrimination, we will now show that as applied to millers it has exactly the opposite effect.

Grain shipped from points of production in Kansas and Nebraska is manufactured into flour, meal, etc.,

at other points, and such products are afterwards shipped from the manufacturing or milling points to markets of consumption, including St. Louis and other points located east of the Missouri river. In each instance the aggregate of the in and out rates is the same as the through rate on the grain; that is to say, the through rate is made by adding to the rate on grain from point of origin to milling point the rate on the manufactured product, which is the same as the grain rate, from such milling point to market of consumption. In this connection the testimony of Mr. Munroe, freight traffic manager of the Union Pacific, was as follows:

> Although grain brought into Kansas City, ground into flour and shipped out is treated by the railroads as a grain shipment from the point of origin to the point of destination, the flour taking the balance of the through rate at exactly the rate paid on grain, the allowance is not made to millers, although the millers release the equipment. (Peavey Rec. 257.)

It will therefore be seen that as between two millers, one of whom uses an elevator and manufacturing plant located at Council Bluffs, and the other of whom uses an elevator and manufacturing plant located at St. Louis, there is a discrimination of three-fourths of a cent per 100 pounds; but in this case instead of the discrimination being against the party located at St. Louis, it is against the party located at Council Bluffs. Although both parties buy the grain at the

same point west of the Missouri river and sell the manufactured products at St. Louis, the one who does the manufacturing at St. Louis may pass the grain through an elevator located at Council Bluffs and thereby obtain the benefit of the elevator allowance of three-fourths of a cent per 100 pounds, while the other, although he passes his grain through the same elevator, can not obtain such an allowance or any allowance at all.

We are confident the above fully demonstrates that the discrimination under consideration constitutes a violation of the prohibition against undue preference and undue prejudice contained in section 3 of the Act, and because of matters already referred to and other circumstances to which we will now call attention, we are equally certain that such discrimination is a violation of section 2 of the Act.

Section 2 provides that it shall be unlawful for a carrier, by any special rate, rebate, drawback, or other device, to exact a greater or less compensation from one party than from another for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and that is precisely what is done by the carriers who pay elevator allowances at the Missouri river.

Where the grain is put into an elevator at the river, the transportation of the shipment from point of origin to the river is entirely separate and distinct from and in no way connected with the transporta-

tion of the shipment afterwards made from the river to point of final destination.

In his testimony of 1903 Mr. Munroe, freight traffic manager of the Union Pacific, said:

> When the grain is delivered to the Peavey elevator it passes out of the hands of the Union Pacific and the transaction as far as that road is concerned is practically closed. * * * It is billed in at the Union Pacific's local rate and the Union Pacific collect the local rate when the car is unloaded, or at stated periods. When grain goes out, the Union Pacific's western expense bill is surrendered to the eastern line, where it is verified and stamped. This stamp becomes the authority for the eastern line to accept their proportion of the through rate east of Council Bluffs. The proportion of the through rate which comes to the Union Pacific and the local rate to Council Bluffs are the same. (Peavey Rec. 191.)
>
> Forty-eight hours storage does not apply on Peavey & Company grain; that can remain as long as they choose. (Peavey Rec. 193.)

And from Mr. Munroe's testimony of 1906, as below:

> The object of consigning through to St. Louis is the reflection of an old custom and in order to have entire possession of a document of the Union Pacific in the shape of the expense bill, which brings about east of Council Bluffs on the out shipment the protection of the proportional rate. All grain is billed to St. Louis, care of the Omaha Elevator Company, at Council Bluffs. The shipment is

handled on the local rate of the Union Pacific from interior Nebraska points to Council Bluffs on what we term a local waybill. On arrival there delivery is made to the elevator company, the original bill of lading is retired, an expense bill covering the charges is given to the consignee, and the transaction ends so far as the Union Pacific is concerned. (Peavey Rec. 254.)

The service and the revenue are the same when grain is consigned through to St. Louis and when billed locally to Council Bluffs. There is no other shipper for whom the Union Pacific issues the through bill but Peavey & Company and the Trans-Mississippi Company. (Peavey Rec. 255.)

We treat the Peavey shipment as a local shipment, so far as local waybill is concerned—that is to say, we use the same form there, the same kind of bill, made out with the same pen and ink, no doubt, and handle it on a local waybill, when, as a matter of fact, the Peavey business is through business.

So far as the release of equipment is concerned, so far as the service which is performed by both is concerned, it is identical whether the business goes through or whether it stops at Omaha, Council Bluffs, or Kansas City. (Peavey Rec. 257.)

Mr. Heffelfinger, a member of the firm of Peavey & Company, said:

As a matter of fact, although grain is billed to St. Louis, it goes into the elevator and may be mixed with grain from Iowa, and goes wher-

ever the market may dictate. (Peavey Rec. 212.)

There is no advantage in billing grain through to St. Louis, and Peavey & Company would bill it locally if requested to. (Peavey Rec. 264.)

Mr. Peck, vice-president and general manager of the Omaha Company, said:

All grain on the Union Pacific that goes to Council Bluffs is billed to St. Louis. A new bill of lading is made out when the grain is shipped out of the elevator. At the time the grain goes into the elevator the ultimate destination is not known, and it is not known how long the grain will stay in the elevator. When the grain is shipped from the country it is not known whether or not it will be mixed or blended. There are in the elevator cleaners a dryer, a purifier to purify oats, the Hess system, in which sulphur is used to brighten up the oats. The elevator is operated in the same way that terminal elevators and mixing houses are ordinarily operated, and the grain is shipped out to whatever market seems at the time the best. (Peavey Rec. 213.)

Since the through rate is the same as the local in and the proportional out, there is no advantage in the through bill of lading, and the service performed by Peavey is same in both instances. (Peavey Rec. 215.)

In the case of *In the Matter of Alleged Unlawful Rates and Practices in the Transportation of Grain and Grain Products by Atchison, Topeka & Santa Fe*

Railway Company et al., 7 I. C. C. 240, the facts found by and rulings of the Commission are stated in the syllabus, which reads as follows:

> 1. Shipments of grain were carried to Kansas City, Mo., from points west thereof at local rates, and quantities of grain were afterwards reshipped and rebilled from Kansas City to Chicago or other destinations at the balance of the established through rate from the original point of shipment to Chicago or other ultimate destination, instead of the higher local rate in force from Kansas City to such destination. There was no agreement for through carriage between shipper and carrier at the original point of shipment, no other destination than Kansas City was named, and upon carriage of the grain to that point and delivery to consignee the transportation was completed and the local rate in effect to Kansas City was paid; but the practice was to allow the consignee or other owner of grain at Kansas City to ship from Kansas City to Chicago and other points at the "balance of the through rate," upon presentation of the paid expense bill to Kansas City and certification by a joint agent of carriers at Kansas City. Under this "expense bill" practice it was practicable, through transfer of expense bills, to secure a lower "balance of through rate" than would result from deducting the local rate between the actual point of origin and Kansas City from the through rate between said point of origin and the final destination, and other rate manipulations were possible. *Held*, That such

shipment and reshipment did not constitute a through shipment from the point of origin to the point of final destination, and grain so shipped and reshipped was not entitled to the benefit of the through rate in force. *Held, further,* That the shipment from the point of origin to Kansas City was local, resulting in the grain becoming Kansas City grain, and the fact that it had come from a point farther west was no reason for applying on shipments of such grain from Kansas City any less or different rate than was in force from Kansas City.

2. No opinion upon the practices of milling or reconsigning or holding in transit, if the shipment is a through shipment upon a through rate, is expressed.

After stating the facts, Commissioner Prouty, who delivered the opinion of the Commission, said:

> The first question arising upon these facts would seem to be, Were the shipments under this practice through shipments, and for that reason entitled to the benefit of the through rate which they received?
>
> It is difficult to understand how they can be so treated. Apparently they have not a single incident of a through shipment, but, upon the contrary, the transportation from the point of origin into Kansas City was in every respect local. The bill of lading was local; the rate was local. There was nothing upon any paper connected with the transaction which indicated that the grain was to be carried beyond Kansas City. As a matter

> of fact, there was no definite purpose on the part of its owner to carry it beyond. If it did finally go farther, there was no present idea to what point it would go. It might be consumed at Kansas City; it might be sent forward to Chicago; it might be exported to Liverpool. The object of the owner of the grain was simply to take it into Kansas City for the purpose of disposing of it there, without any thought as to its ultimate destination. (Ib., 246–247.)

In the case of *Chicago, Rock Island & Pacific Railway Company* v. *Chicago & Alton Railroad Company*, 3 I. C. C. 450, the facts were similar to those stated by Commissioner Prouty in the Kansas City case, except that the traffic transported was cattle, and in the Chicago & Alton case, Cooley, chairman, who delivered the opinion of the Commission, said:

> It is impossible to say upon the evidence in this case that when the complainant receives live cattle at points west of Kansas City at through rates to Chicago, but with an understanding that they are to be unloaded at Kansas City to try the market there, there is in point of fact a through shipment from the point of origin to Chicago. So far from that being the case, there is no understanding that there shall be any through shipment at all, and whether there shall be one or not is understood to depend entirely upon the state of market at Kansas City and upon the option of the purchaser if the cattle are there sold.

> If the cattle are finally transported to Chicago, there is not only more than the one loading and unloading, but there is also necessarily some loss of time beyond what would be expected to take place in case of a through shipment. The identity of the cattle may to some extent be changed; the original shipper may cease to have anything to do with the transportation of the freight at that point, and it is pure fiction that treats the transportation as one and indivisible from the point of origin to the point which finally, at the option of the parties, proves to be that of ultimate destination. (Ib., 462–463.)

The facts in this case appear to be identical with those stated as above by Commissioner Prouty, except that a bill of lading, showing St. Louis as the destination point, is executed by the Union Pacific; but we have seen that when St. Louis is so named no one connected with the transaction expects that fact to control in any way the final destination of the grain.

As stated by Commissioner Lane in his dissenting opinion (Peavey Rec. 33–34):

> The St. Louis bill is, in fact, a sham. It serves no purpose save to give color to the pretense that the grain is on its way to St. Louis and is properly subject to transfer at Omaha. Mr. Munroe, traffic manager of the Union Pacific, testified that his road handles the grain on a local waybill to Omaha and that upon delivery at Omaha the through bill of lading is absolutely retired. Omaha

> is the destination of the grain, not its point of ultimate consumption, perhaps, but its destination from an immediate transportation standpoint. Therefore, as it goes out of the possession of the railroad at Omaha and out of the control of any carrier, it seems to me conclusive that it is not transferred in transit.

What is true of grain shipped over the Union Pacific is true also of grain shipped over other lines to the river from points of origin in Kansas and Nebraska, since in every instance the shipment to the river is upon the local rate of the carrier. (Peavey Rec. 317.)

It may be said that where the transfer charge is paid the service performed is greater than it is otherwise, because in one case the car is unloaded at the river and in the other case it is not, but this would not be true of a shipment of grain transported from western points of origin to the river and afterward ground into flour and other products at the latter point. Also, the record shows that the transfer of grain through an elevator at the river and the payment of an elevator allowance are not confined to cases where it is necessary to release the cars in which the grain is transported to the river from points of origin in Nebraska and Kansas. In this connection the testimony of Mr. Heffelfinger was as follows:

> If it were not for the elevator at Council Bluffs, Peavey & Company could do their business just as well at Chicago, but would not have as many markets to reach. Cars of other carriers east of the river, when loaded by Peavey & Company, are transported to [through] the

> elevator at Kansas City or Council Bluffs It makes no difference to the Union Pacific what the initial is; they use all cars of other companies on their lines. * * * I presume any road would be glad to use the equipment of any other road in times when they were in need.
>
> Q. If that is so, and if they have the power to do it, the fact that you stop it and run it through the elevator is not because these foreign carriers would not take out the cars that came in, but simply in order that you may get the cent and a quarter?
>
> A. Most assuredly. * * * (Peavey Rec. 205.)

And Mr. Crosby said:

> The allowance would be made if the grain came to Omaha in Burlington equipment and went to St. Louis in Burlington equipment, if it is transferred through the elevator. (Peavey Rec. 274.)

From July 5, 1905, to July 5, 1906, the percentage of foreign cars used on the Union Pacific lines was 64.82. (Peavey Rec. 248.)

The record shows that payments on account of elevator allowances are not made by the carriers unless and until the grain is transported east from the Missouri river, and it may therefore be contended that such payments are connected, not with the transportation west of the river, but with the transportation east of the river.

That this contention is true might be admitted without even tending to change the fact concerning a

violation of section 2. For instance, if the proportional rate on wheat from Council Bluffs to St. Louis were 9 cents per 100 pounds and the carrier who hauled the wheat between those points paid to the shipper an elevator allowance of three-fourths of a cent per 100 pounds where the wheat was transferred through an elevator at Council Bluffs, but refused to pay such an allowance, or any allowance, where the wheat was transferred through an elevator at St. Louis, it is evident that the carrier would thereby be guilty of exacting a greater compensation from one shipper than from another for the transportation of a like kind of traffic, where in each instance the transportation was over the same line, in the same direction and between the same points, and the transportation services were performed under substantially similar circumstances and conditions.

However, since the Union Pacific performs no transportation services east of the river, it is clear that the elevator allowances paid by that carrier pertain to transportation, not east of the river, but west of the river. Indeed, the Peavey contract hereinbefore referred to provides for such payments only upon grain shipped from said points of origin west of the river over the lines of railway of the Union Pacific to Council Bluffs and Kansas City.

Also, even where the elevator allowances are paid by the carriers who haul the traffic east of the river, such payments must be considered as connected with the transportation west of the river if it be found as a

fact that they are compensation for unloading grain into an elevator at the river and releasing equipment used west of the river.

But even if we regard the shipments upon which elevator allowances are paid at the river as through shipments from points of origin west of the river to points of final destination east of the river, the carriers who pay the allowances at the river violate section 2 of the Act because the net amount paid by the shipper and retained by the carrier is three-fourths of a cent per 100 pounds less where an allowance is, than where it is not, paid; and regardless of whether or not an allowance was paid, the transportation would be over the same line, in the same direction, and between the same points.

We have seen that where the grain is transported by the Union Pacific the allowance is paid in connection with the transportation from point of origin in Kansas and Nebraska to the river, while in every other case the allowance is paid in connection with the transportation of the grain from the river to point of final destination. We thus have the spectacle of a carrier's rates for transportation being dependent upon, not the service performed by that carrier, but something done by another carrier in connection with other and different transportation services.

Although it is not shown by this record that the incentive created by the facts stated in the last preceding paragraph has led to the manipulation of expense bills, we think it is apparent that such ma-

nipulation might be indulged in. Beyond question the present arrangement places a premium upon grain transported over the railway of the Union Pacific west of the river. No allowance is paid by the carrier which hauls the grain east from the river where the transportation services west of the river are performed by the Union Pacific, but where the transportation services west of the river are performed by some carrier other than the Union Pacific the carrier which hauls the grain east from the river pays an allowance of three-fourths of a cent per 100 pounds. It is therefore evident that the latter carrier would prefer to have a shipper present an expense bill showing that the transportation services west of the river were performed by the Union Pacific, and where a shipper unloads into an elevator located at the river and mixes grain shipped by him to the river over lines of railway operated by different carriers west of the river and sells some of the grain for consumption at the river, it is apparent that in the matter of presenting expense bills when he makes shipment east from the river he may favor either the carrier which hauls the grain from point of origin to the river or the carrier which hauls the grain from the river to point of final destination. Whether or not under these circumstances the shipper would undertake to obtain from the carrier favored by him benefits he could not otherwise secure is, of course, a matter of speculation.

Apparently a shipper could obtain an elevator allowance at one Missouri river point, even where a

similar allowance had been paid upon the same grain at another Missouri river point. In this connection we call the attention of the court to the testimony of Mr. Leland, assistant general freight agent of the Missouri, Kansas & Texas Railway Company, which is as follows:

> Q. As I understand, a man could ship grain from Omaha and then to St. Joe and Leavenworth and get an elevation charge at each point. Could he do that?
>
> A. I do not know; he could get the elevator charge from us after he gave us the grain, but would have to pay local rates from each point. These elevator allowances are made to meet competition. (Peavey Rec. 279.)

No circumstance or condition which does not pertain directly to the carriage of the traffic, not even competition between different carriers, can be shown for the purpose of proving that the different shipments are not transported by the carriers under substantially similar circumstances and conditions, because section 2, as construed by this court, applies only to the matter of the carriage and does not include competition between rival routes.

> *Wight* v. *United States*, 167 U. S. 512, 518;
> *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 168 U. S. 144, 166–167;
> *Interstate Commerce Commission* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 253.

For the reasons stated above, and for other reasons which are obvious, we think the holdings of the circuit court, that the Commission has no power to require

a carrier to cease and desist from paying to a party interested in grain an allowance for services rendered in connection with the transfer thereof from car to car through an elevator, where the grain is cleaned, clipped, mixed, or otherwise treated while being so transferred, and that the circumstances and conditions developed by the record do not show a violation of either section 2 or section 3 of the Act, are erroneous and should be reversed.

II.

IN THE DIFFENBAUGH CASE, THE CIRCUIT COURT ERRED IN OVERRULING THE DEMURRER OF THE COMMISSION, AND IN ALLOWING THE MILWAUKEE, WABASH, GREAT WESTERN AND CHICAGO & ALTON COMPANIES TO INTERVENE ON BEHALF OF THE PETITIONERS.

In this connection we do not wish to make an extended argument, because a statement was filed in the circuit court on behalf of the Commission which reads as follows:

> The defendant does not understand that the issues presented in the Peavey Case and in this case are the same, since in the Peavey Case the petition is brought to enforce a specific contract, while in this case it is brought to set aside an order of the defendant.
>
> The facts are, however, the same in both cases, and the two can properly be tried together.
>
> The defendant desires a judicial interpretation of this question. It would be glad to have the court entertain jurisdiction upon

> this petition and dispose of the matter as though brought upon the petition of a carrier against whom the order was directed. It does not, however, believe that the court can entertain such jurisdiction upon the application of these petitioners, and deems it its duty to make this objection *in limine*. (Diffenbaugh Rec. 27.)

We think that neither the petitioners nor the intervenors in the Diffenbaugh case have such an interest in the order of the Commission to which that case relates as entitles them to maintain in court a suit to set aside the order. It will be seen that for the purpose of securing in future benefits derived by them in the past, through elevator allowances paid by the carriers against whom the order was entered, said petitioners are seeking to have the order annulled and set aside.

But it is apparent that no decree the court can make will determine as against such carriers the right of the petitioners to said allowances; and, in this regard, what is true of the petitioners is true also concerning the intervening carriers. The right of the latter to pay elevator allowances at Missouri river points can not be determined in a suit brought to set aside an order issued against other carriers for the purpose of removing a discrimination between Missouri river points on the one hand and St. Louis on the other.

It will be observed that the lines of the carriers against whom the order is directed run both to the Missouri river points and to St. Louis, while the

lines of the intervening carriers do not reach St. Louis. Regardless of any action taken by the court in connection with the order of the Commission, the intervening carriers will be free to pay elevator allowances at Missouri river points, and even if the order is set aside, the carriers against whom it is directed will still be free to refuse to pay such allowances.

We therefore submit that the circuit court should have upheld the demurrer of the Commission, and should also have refused to allow the interventions referred to. (Foster's Federal Practice, 2 ed., Vol. 1, sections 2, 12; *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.* 218 U. S. 88, 109–110.)

III.

THE CIRCUIT COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THE JUDGMENT OF THE COMMISSION CONCERNING THE CHARACTER OF THE DISCRIMINATION AND PREFERENCE AND PREJUDICE UPON WHICH THE ORDERS IN QUESTION ARE BASED.

In speaking of the powers of the Federal courts where called upon to suspend or set aside an order of the Commission, the circuit court said:

> The Interstate Commerce Commission is an administrative tribunal and the wisdom and expediency of the lawful exercise of the discretion delegated to it under the Constitution and the statutes is not reviewable by the courts. (Peavey Rec. 323.)

But after making this statement it examined the evidence and stated as facts, that the discrimination referred to is not unjust, and that the preference and prejudice complained of in the proceedings before the Commission are not undue. (Peavey Rec. 330, 331.)

The circuit court made other statements as follows: (Peavey Rec., 322–326.)

It said the Diffenbaugh case is a controversy between competitors in transportation and in trade, and that the order in that case was procured by parties who are opposed to the payment of elevator allowances at the Missouri river, without notice to those who favor a continuance of such payments; but it overlooked the fact that the order was made, not for the purpose of distributing business between carriers and grain dealers, but to prevent carriers from making concessions which enable certain shippers to obtain rates lower than those contemporaneously exacted from other shippers, under circumstances where no disparity in rates is justified, and it failed to note that officers of the intervening carriers were complainants, and testified before the Commission, in the Peavey case, and that the investigations which culminated in the orders of June 29, 1908, were of great length and well advertised.

It said that if the payments were discontinued those who, in the expectation that they would be continued, have made investments, will suffer losses; and in this connection it called attention to the fact that a large number of elevators have been built at

Missouri river points during the last decade. We have previously shown that nearly all the elevators referred to were erected during the time when payment of elevator allowances was confined to the Peavey companies and the Trans-Mississippi Grain Company. (Peavey Rec., 226, 252–253.) It is therefore evident that those who invested money in elevators relied, for profits, upon matters other than the payment of elevator allowances. They knew what the record in this case establishes, namely, that parties who own elevators located at points on the Missouri river have, without reference to the payment of elevator allowances, a natural advantage over those whose elevators are located at points farther removed from the grain fields of Kansas and Nebraska, and they also knew that such advantage could not be taken away by either the carriers or the Commission.

It said profitable contracts relating to the allowances and the right of parties to enter into such contracts will be destroyed, if payment of the allowances is prohibited. The only contracts mentioned in the record are those under which elevator allowances have been paid to the Peavey companies and to the Trans-Mississippi Grain Company. These contracts have in the past been very valuable to the companies last above mentioned, because under them those companies have secured advantages their competitors did not enjoy and could not obtain, and in this regard, for reasons hereinbefore stated, the future will be a repetition of the past, if the decree

of the circuit court is affirmed by this court. It is unnecessary to add that if, by entering into contracts with carriers, shippers can obtain and retain advantages they would not otherwise be able to secure, such contracts will become both numerous and popular.

Over the contracts, as such, the Commission has no jurisdiction, but this is a matter of no consequence whatever. Under the decisions of this court such contracts are null and void to the extent a compliance with their terms requires the doing of something prohibited by the Act, and in this regard there is no distinction between contracts which are legal when made, because in consonance with the laws then existing, and contracts which at the time they are executed contravene one or more of the provisions of the Act. (*New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 398; *Armour Packing Company* v. *United States*, 209 U. S. 56, 80.)

In this connection, however, we call the attention of the court to provisions in the contracts referred to, which indicate that at the time the contracts were executed the parties thereto were suspicious that payments made thereunder might be held to be unlawful. In the fifth paragraph of Article 1 of the Peavey contract, it is provided that "At no time shall the transfer charge herein provided to be paid exceed such transfer charge as is customarily made upon similar business at similar points." (Peavey Rec., 128.)

And in the fourth paragraph of Article 1 of the Trans-Mississippi Grain Company contract, it is provided that "Compensation for the transfer service to be rendered by the Grain Company, at no time shall exceed the transfer charges customarily made upon similar business at the same or similar points." (Peavey Rec., 136.)

It said that one thing which prompted the action of the Commission was the fear that the practice of paying elevator allowances might result in rebates and effect unjust discrimination, while the legal presumption is that parties will obey the law and discharge their duties. (Peavey Rec., 324.)

There is a striking contrast between these statements, on the one hand, and the problem the Commission was called upon to solve at the time it made said orders, on the other hand. At that time it was confronted, not with a theory, but with a condition. It had previously construed the law as it has now been construed by the circuit court, but after several years' experience had discovered that the law thus interpreted actually facilitated the very discriminations it was framed to prevent.

It said the cleaning, clipping, mixing, inspecting and grading of grain in an elevator is a trade service which the Commission has no power to separate from the service of transferring the grain from car to car. It admitted that the treatment of the grain in an elevator gave to the owner of the grain an advantage over his competitors, but said such advantage resulted from the ownership of the elevator facilities and was

not attributable to the transportation or transfer of the grain.

We think this indicates clearly that the circuit court entertained erroneous views concerning the pertinent facts and their bearing upon the matters under consideration. It evidently failed to appreciate the fact that wherever grain is treated in an elevator it must be transferred from car to car, and we also think it failed to realize that such treatment, while the grain is in transit, would be impossible, except by permission of the carrier. Indeed, as hereinbefore shown, the advantage derived from such treatment could not be secured without the cooperation of the carrier.

It said the advantage last above referred to is similar to the advantages shippers obtain from milling-in-transit privileges which carriers accord with the approval of the Commission, but it failed to note that the Commission does not require such privileges to be granted and permits them only where, in the judgment of the Commission, they do not result in unjust discrimination, undue preference or undue prejudice. It also failed to note that a milling-in-transit privilege does not include a payment by a carrier to a shipper for a service which is a commercial necessity, and which, therefore, the shipper must perform for himself at his own expense.

It said the discrimination and preference and prejudice could not be held to be unlawful because they are authorized by law. In other words, it said the amendments to sections 1 and 15 of the Act con-

tained in the Hepburn law limit in their operation the power of the Commission over discriminations. This is equivalent to saying that by those amendments sections 2 and 3 of the Act were so modified that they have not since prohibited, and do not now prohibit, all unjust discriminations, undue preferences and undue prejudices, but only those which do not arise from the payment of elevator allowances. This view of the law will undoubtedly surprise somewhat those who understood that the law was passed to strengthen the hands of the regulating tribunal and enable it to prevent common carriers from exacting a greater or less compensation from one party than from another for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

In the case of *Gund & Company* v. *Chicago, Burlington & Quincy R. R. Co.*, 18 I. C. C. 364, the matter under consideration was a discrimination which resulted from elevator allowances paid by the carrier at Nebraska City, Nebraska, and the carrier's refusal to pay similar allowances at other points. In that case the decision of the circuit court now under consideration in this case was of course a matter of great importance, and on May 2, 1910, in a unanimous decision of the Commission written by Commissioner Lane, the Commission made statements and expressed its opinion as follows:

> From and after July 19, 1907, therefore, this allowance of three-fourths of a cent per 100 pounds at Nebraska City has been paid as alleged by the complainant. The prayer is

for reparation to the extent of three-fourths of a cent per 100 pounds upon all shipments made through Nebraska City in competition with the Duff Grain Company during this period.

The elevation-allowance question is not new to the Commission. On June 29, 1908, the Commission issued orders forbidding the Chicago, Burlington & Quincy Railroad, the Missouri Pacific Railroad, the St. Louis & San Francisco Railroad, the Chicago, Rock Island & Pacific Railway, the Missouri, Kansas & Texas Railway, and in effect forbidding the Union Pacific Railroad to pay or allow owners or lessors of elevators at Omaha, Kansas City, and other cities on the Missouri River such allowances as the one here under consideration. *In the Matter of Allowances to Elevators* (*Union Pacific Elevator*), 14 I. C. C. Rep., 315; *Traffic Bureau, Merchants' Exchange, of St. Louis* v. *C., B. & Q. R. R.*, 14 I. C. C. Rep., 317, 331, 510.

This decision of the Commission was based upon its knowledge of the facts. We know from our experience with the problems here involved, and from the special investigation given this subject, that this allowance is unduly discriminatory and unduly preferential, and that it serves to strengthen the dealers in grain who receive it as against their competitors at other points on the same lines of railroad who do not receive it. We have determined, furthermore, from such experience and such examination that it is not an allowance for any service rendered to the railroad company, but that it is a payment by the railroad

for service rendered by elevators to the owners of the grain. This being so, it is simply a concession from the published rates wherever paid.

Our orders in the above case have been suspended by the United States circuit court for the western division of the western district of Missouri, the learned judges sitting in such court having determined that our findings of fact were mistaken and having made findings of fact at variance thereto. *Peavey & Co.* v. *Union Pacific R. R. Co.*, 176 Fed. Rep., 409. While we recognize that upon questions of law this Commission must and should yield to the courts, we also understand from repeated decisions of the Supreme Court that the courts are not competent to determine questions of fact within the jurisdiction of this Commission as against the Commission after the latter, upon complaint and answer, has investigated such questions and found thereon. Were we more doubtful than we are on this point, a perusal of the opinion of the court in this matter would constrain us to adhere to this conclusion. This opinion throughout deals with the elevation at Missouri River points as if it were a mere transfer of through shipments from car to car for the convenience of carriers. For instance, the opinion says:

"The schedules of the carriers and their practice limit this elevator allowance or payment to grain coming into the elevators from the west which is actually loaded out into cars sent north, south, or east, and this service of unloading grain out of cars which have brought it from the west and loading it into

cars which carry it to points east, north, and south is elevation and transfer in transit within the meaning of the amended interstate commerce act."

The bills of lading covering the business here discussed prove to our minds that the above conclusion of fact reached by the court is not correct. The bills of lading show that the shipments to the elevators are made locally without any reference whatever to any possible further transportation at some future time. The bills of lading and other documents describing the shipments of grain from these elevators show that no attempt whatever is made to identify the shipments out with any particular shipments in. The grain which goes out may be the grain which was hauled in by the carrier paying the allowance or it may be grain which reached the elevator in some other way. The only proof required is that the tonnage of grain shipped out shall be equal to the tonnage of grain shipped in. Such shipments can be called through shipments only by construction.

The opinion of the court speaks of elevation as if it were merchandising, which is precisely what the elevation for which this allowance is made is in every case. The merchandising of grain, however, is no part of the duty of the carrier. For carriers to pay shippers for any of the operations of merchandising, under the pretext that the payment is for service rendered to the carrier, is for the carrier to make reductions from published rates by subterfuge. Such allowances can not possibly be paid to all shippers. Their purpose would be

lost if they were. They are intended to create an inequality and would not be paid did they not do so.

The learned court for proof that the shipments are in continuous transportation throughout the period of elevation and merchandising cites and rests upon the fact that they are moved from Missouri River points to the east upon so-called proportional rates, saying:

"It is said that the grain upon which the allowance is made is not elevated or transferred in transit because it is shipped from points of origin in Kansas and Nebraska to the Missouri River upon local rates and local waybills, but the proportional rate is the balance of the through rate. There are proportional rates beyond the Missouri River and the Mississippi River and points east, west, north, and south which are less than the local rates between those points, and this grain which comes from points west of the Missouri River takes not the local but these proportional rates east of the river upon the certificates or expense bills of the companies west of the river which show whence it came."

We are unable to understand how the name given by the carriers to the rate imposed upon the second shipment can determine the legal character even of such second shipment. We have still more difficulty in understanding how the name given such rate can relate to and determine the character of the shipments into the elevators upon separate and inde-

pendent bills of lading. Our perplexity is made still greater by a reference to these very rates in a case recently decided by the circuit court of appeals for the circuit which includes the western division of the western district of Missouri, two of the judges who made the decision here discussed taking part. This case was *Wisconsin Central Railroad Co.* v. *United States,* 169 Fed., 79. A carrier was under prosecution for making an elevation allowance without tariff authority. Its defense turned upon the point that the shipments were in continuous transportation during the period of elevation, and its proof of the fact was that transportation from the elevator was given upon a "proportional" rate identical in nature with the proportional rate discussed by the court in the decision here under consideration. The court of appeals said:

"Some significance is attached to the name given to the rate of 7½ cents per 100 pounds on shipments to Milwaukee and Chicago. It was called in the tariff schedules proportional freight tariff on grain and flaxseed when originating west of the Mississippi River. The tariff shows that there was no joint tariff or arrangement of any kind existing between the railway company and any other connecting carriers operating west of Minneapolis. In such circumstances we fail to discern any advantage to the railway company by the use of that inaccurate designation of its tariff."

We also have in mind the fact that the carriers from the Missouri River to the east are now dropping the pretense that these

are portions of through rates, and are publishing them as "reshipping rates."

Shipments such as those made to Nebraska City by the Duff Grain Company are local to that point. The delivery in accordance with the contract of transportation ends the transaction. The grain is not in transportation during the time of elevation, nor does transportation again begin until the grain has been loaded in the cars for out-bound shipment in accordance with the tariff publications of the carriers governing such carload shipments. *G., C. & S. F. Ry. Co.* v. *Texas*, 204 U. S., 403; *A. & V. R. Co.* v. *Railroad Commission of Miss.*, 203 U. S., 496.

The carriers whose lines end at the Missouri River, such as the Union Pacific, are in competition throughout Nebraska and Kansas with carriers whose lines extend through to Chicago or St. Louis, such as the Chicago, Burlington & Quincy, the Chicago & North Western, the Atchison, Topeka & Santa Fe, and the Missouri Pacific. The carriers whose lines end at the Missouri River desire, naturally, that grain markets should be established at their terminals. They also desire to join with other connecting carriers in the publication of through joint rates to points beyond, the same in amount as the sum of their rates to the river plus the rates of connecting carriers to destinations beyond. Their desire to have markets at the Missouri River leads them to seek devices by which the rates upon shipments unloaded at the river and then reshipped beyond shall be less than the rates

for shipments consigned directly to the points beyond. Being unwilling either to give up the advantage of fostering the markets at their terminals, or to abandon the joint rates to points beyond, they have devised the system of elevator allowances upon shipments to the river when reshipped beyond as a means for making rates to patrons of elevators at the river which shall be less than the rates given other shippers who do not patronize such elevators. To maintain a system by which through rates shall exceed the sum of the local rates based upon the cities at their terminals is the purpose and effect of these allowances. This Commission has repeatedly ruled, however, passing upon the question as a matter of fact, that a through rate in excess of the sum of the locals is prima facie unreasonable. Upon shipments of grain from country points in Nebraska to the Missouri River, there unloaded into an elevator, afterwards loaded and shipped beyond, the carriers render transportation from the first point of origin to the final destination with four terminal services, one at the point of origin, two at the river, and one at the final destination. Upon shipments of grain moving directly from origin to final destination the two intermediate terminal services are rendered unnecessary. A higher rate for the smaller service, under circumstances that are identical, is, as this Commission has held, unreasonable.

With all due respect to the circuit court for the western division of the western district of Missouri, this Commission is con-

strained by the facts to adhere to its view that these allowances are unduly discriminatory and unduly preferential both in purpose and in effect. It therefore declines at this time, and until its position shall have been finally overruled by the higher courts, to extend the benefit of this system of elevator allowances to complainant's elevators.

What is above said with regard to the view that the purpose and effect of these allowances is to cause through rates to be greater in amount than the sum of the locals was not discussed at the hearing or argument in this proceeding. It would be improper, therefore, to base any award of reparation thereon. No dismissal of this complaint will be made, inasmuch as this would cause the statute of limitations to run against complainant's claim. It will be held for further action when the decision of the Supreme Court upon the matters here involved shall have indicated the power of the Commission in the premises. (Ib. 366–369.)

CONCLUSION.

In an effort to confine this brief within reasonable limits, many important matters of detail have been omitted, but they are included in the reports of the Commission and will therefore be before the court.

The record shows that a very large number of shippers who do not receive the elevator allowances referred to are endeavoring to compete in the grain business with shippers who do, and it is evident that the handicap under which the shippers discriminated

against labor is also a serious drawback to the localities where the elevators used by such shippers are located; but the full extent of the annoyance, injury, and demoralization caused by the discriminations under consideration can be more easily imagined than described.

We think the history of this case shows clearly that the Commission has felt compelled recently to examine more closely than it formerly deemed necessary contracts entered into by and between carriers and large shippers, and restrain the operation of such contracts where, in the judgment of the Commission, the discrimination and preference and prejudice prohibited by sections 2 and 3 of the Act could not otherwise be prevented. The Commission is of the opinion that it has been given such authority by the law under which it operates, and does not believe, either that the amendments of June 29, 1906, contained in the Hepburn law, were made for the purpose of limiting its authority over discriminations, or that, when read in connection with other provisions of the Act, they have that effect. On the contrary, it thinks those amendments were made to place in the hands of the Commission, in addition to the remedies which existed prior to that date, the remedy included in section 15 of the Act, as aforesaid.

In this case the Commission has discovered that the discrimination which it has found to be unreasonable and unfair can not be removed or prevented by limiting the elevator allowance to such sum as would be a reasonable compensation for transferring the grain

from car to car, because the transfer is a commercial necessity and a service which, if no payment therefor were made by the carriers, the owner of the grain would be compelled to perform, or have performed in his behalf, at his own expense.

Under these circumstances it may be said that, instead of requiring the carriers to desist from paying the allowances at Missouri River points, the Commission should have simply required the carriers to desist from the discrimination found to be unlawful, and thus have given them an opportunity to remove the discrimination by making similar payments at other points, but, as above pointed out, the discrimination could not have been removed by such a method of procedure, because the cost of transferring grain is greater at one point than at another point, and greater at one time than at another time at the same point.

We are aware that many matters discussed in this brief bear upon the wisdom and expediency of the action taken by the Commission, but views expressed in its opinion by the Circuit Court seemed to us to render proper and advisable such discussion.

We are confident that the facts disclosed by the record justify fully the orders of the Commission, and therefore contend that the decree of the circuit court is erroneous and should be reversed.

Respectfully submitted.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission, Appellant.

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